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# TAKING PERSONHOOD SERIOUSLY

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*This Article takes the recent Twitter merger litigation, along with other high-profile legal developments, as an opportunity to re-examine one of the most important, and misunderstood, concepts in the modern social landscape: legal personhood. The Article makes three main contributions to the literature: first, it originally connects several key stages in personhood’s historical development, from the common law, through the hurdles of legal realism and the early law and economics movement, to the recent revival of substantive personhood, both in scholarship and following the Supreme Court’s decisions on corporate constitutional rights. It then integrates this history with an analysis of the legal scene where personhood achieved its most profound impact, from the 1980s takeover era to the Twitter story: Delaware corporate law. Finally, this Article builds upon these insights to offer a new theoretical account of personhood as a legal degree of freedom, which holds the capacity to generate a practically unlimited range of situational outcomes. So far, scholars have tended to discuss personhood in a limited, context-specific manner. This Article brings personhood front and center in its own right, illustrating for the first time how personhood can be a no less, and often more, significant fact of legal life than contract, property, or public law, and why we should place it at the start of the analysis, prior to delving into the policy discussion of the day.*

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## I. INTRODUCTION

The recent *Twitter*<sup>1</sup> dispute was not, to put it mildly, a case you see every day. Above all, the case was characterized by its multi-episode, twist-and-turn nature: at first, a group of (very) well-financed entities came to Twitter’s public shareholders with a takeover bid,<sup>2</sup> which the company, through its directors, expectedly resisted, employing a battery of defensive measures (including the famed “poison pill”).<sup>3</sup> Next, and less predictably, the company changed its mind, agreeing to a merger contract, according to which Twitter’s shareholders were to be paid \$44 billion for the entirety of

<sup>1</sup> *Twitter, Inc. v. Musk*, C.A. No. 2022-0613-KSJM, 2022 WL 16963539 (Del. Ch. Nov. 15, 2022).

<sup>2</sup> See Morgan Stanley Senior Funding, Inc. et al., *Transaction Description*, EDGAR (Apr. 20, 2022), [https://www.sec.gov/Archives/edgar/data/1494730/000110465922048128/tm2213229d1\\_ex99-c.htm](https://www.sec.gov/Archives/edgar/data/1494730/000110465922048128/tm2213229d1_ex99-c.htm) [on file with the Columbia Business Law Review].

<sup>3</sup> See, e.g., Nelson Mullins Riley & Scarborough LLP, *Twitter’s Board of Directors Adopts a Poison Pill*, JD SUPRA (Apr. 19, 2022), <https://www.jdsupra.com/legalnews/twitter-s-board-of-directors-adopts-a-8845074> [https://perma.cc/6JZY-S5Y5].

their holdings.<sup>4</sup> The acquiring entities then changed *their* mind.<sup>5</sup> In response, Twitter chose to file suit in the Delaware Court of Chancery, demanding the specific performance of the merger.<sup>6</sup> Finally, the buyers reverted to their original position, closing the deal (and having the court case voluntarily dismissed).<sup>7</sup> In the months following the merger, a polyphony of voices were heard for and against the new management; many were framed as legal arguments, claiming that Twitter was failing to meet certain obligations to its stakeholders.<sup>8</sup>

This Article goes beyond the more immediate (and colorful) aspects of the case, covered in previous commentary, and explains how *Twitter*—together with a broad group of other high-profile cases and policy debates<sup>9</sup>—is the story of a concept that, despite dating to the early days of the common law (if not earlier),<sup>10</sup> remains deeply misunderstood: legal personhood. Many turns of the plot described above implicate Twitter's nature as a separate legal person: in the first place, Twitter's directors *could* conceivably resist a high-premium buyout offer because their fiduciary duties were never owed to

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<sup>4</sup> See, e.g., Twitter, Inc., *Elon Musk to Acquire Twitter*, PR NEWSWIRE (Apr. 25, 2022), <https://www.prnewswire.com/news-releases/elon-musk-to-acquire-twitter-301532245.html> [<https://perma.cc/PC5Z-JZQR>].

<sup>5</sup> See, e.g., Lauren Hirsch & Mike Isaac, *Elon Musk Threatens to End Twitter Deal Without Information on Fake Accounts*, N.Y. TIMES (June 6, 2022), <https://www.nytimes.com/2022/06/06/technology/elon-musk-twitter.html> [<https://perma.cc/3X3W-NM4D>].

<sup>6</sup> See Verified Complaint at 61, *Twitter, Inc. v. Musk*, C.A. No. 2022-0613-KSJM (Del. Ch. July 12, 2022).

<sup>7</sup> See *Twitter, Inc. v. Musk*, C.A. No. 2022-0613-KSJM, 2022 WL 16963539, at \*1 (Del. Ch. Nov. 15, 2022).

<sup>8</sup> See, e.g., Daniel Wiessner, *Twitter Is Hit with Dozens of Legal Complaints by Ex-employees*, REUTERS (Dec. 20, 2022), <https://www.reuters.com/legal/twitter-is-hit-with-dozens-legal-complaints-by-ex-employees-2022-12-20> [<https://perma.cc/6V8T-RGNP>].

<sup>9</sup> See *infra* Parts III–V.

<sup>10</sup> See, e.g., Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1360–61 (2006) (discussing a form of organization possessing separate legal personhood in ancient Rome).

shareholders, but to the corporate entity.<sup>11</sup> The directors chose to make Twitter file the Chancery lawsuit, and bring the merger to a close, within their broad discretion under the business judgment rule, itself related to pursuing the corporation's powers as a legal person.<sup>12</sup> Finally, when some of Twitter's stakeholders raised legal objections to their treatment by the post-merger entity, they could do so precisely because they still had the same legal rights as they did *before* the merger; the drastic change in the composition of Twitter's *shareholders* did not, and could not, modify Twitter's duties *as an entity*.<sup>13</sup>

The Article makes three original contributions to the literature: first, it provides a summary of the development of personhood discourse, in the United States and abroad, over the last two centuries, in a manner that informs current debates on the topic. Second, it brings together the three main scenes where personhood is operating today—state law (especially Delaware) policy and doctrine, the law and economics scholarship on organizational law, and the controversy surrounding the Supreme Court's decisions on corporate rights—scenes which, until today, have not adequately interacted with one another. Third, it offers a new unifying theory for personhood as a *legal degree of freedom*. Understanding personhood in this manner allows participants, for the first time, to recognize the various implications of personhood (from *Citizens United* to *Twitter* and anything in between) as aspects of the same underlying principle, to accept personhood as a pre-existing, anchoring

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<sup>11</sup> See, e.g., *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989) (“[D]irectors, generally, are obliged to chart a course for a corporation which is in its best interests . . . . [A]bsent a limited set of circumstances as defined under *Revlon*, a board of directors . . . is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover.”). For discussion of the facts indicating that Twitter was outside of *Revlon* mode, and its directors were not under any legal obligation to accept (or litigate) the high-premium takeover bid, see *infra* text accompanying notes 324, 351–69.

<sup>12</sup> See *infra* text accompanying notes 351–69.

<sup>13</sup> See, e.g., Asaf Raz, *The Legal Primacy Norm*, 74 FLA. L. REV. 933, 936–38, 987–89 (2022).

element of future situations and policy discussions (which it will inevitably give rise to), and to realize there is no contradiction between non-human personhood and the economic or social welfare of humans.

At present—and despite its clear role in shaping the outcome of what is possibly the highest-profile corporate law case in history<sup>14</sup>—personhood remains the subject of minimization, intellectual fragmentation, and sometimes even mockery or disdain<sup>15</sup> by members of the legal community and the broader public. Having developed as a well-recognized part of the common law—where, throughout the nineteenth century, federal and state courts could invoke personhood with little chance of provoking serious disagreement<sup>16</sup>—personhood began running into a series of socio-legal snags

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<sup>14</sup> See, e.g., Andrew K. Jennings, *101 Lawyers: Attorney Appearances in Twitter v. Musk*, 73 DUKE L.J. ONLINE 77, 78–79 (2023) (discussing the broad attention paid to the *Twitter* case by the legal community and the general public). Note that the *Twitter* Chancery case, when considered within the four corners of the pleadings, can be better described as a contract law, rather than corporate law, case. That is because the parties' merger agreement was the font of the dispute, and that document is a contract—as opposed to the corporation's charter or bylaws, which are corporate law-specific instruments. The terms of a merger agreement may not violate applicable corporate law, but the agreement itself is not primarily governed by corporate law. A merger is a single, close-ended event, in contrast to the open-ended, unknown range of future events associated with the corporation as a going enterprise, which is the central concern of corporate law. A similar corporate/contract boundary situation arises with preferred shares. See Raz, *supra* note 13, at 982 n.292. Where the *Twitter* "case" is discussed in this Article, the term is often used in a broader manner, to describe the factual and legal story leading to and surrounding the litigation, a story which involved the classical corporate law elements of Twitter as an entity, its shareholders, its fiduciaries, and the equitable rights and duties of each.

<sup>15</sup> See, e.g., Stephen M. Bainbridge, *The Corporation Is Not a Real Entity and to Argue to the Contrary Is "Transcendental Nonsense"*, PROFESSORBAINBRIDGE.COM (Apr. 5, 2021), <https://www.professorbainbridge.com/professorbainbridgecom/2021/04/the-corporation-is-not-a-real-entity-and-to-argue-to-the-contrary-is-transcendental-nonsense.html> [https://perma.cc/K86W-Q8P7].

<sup>16</sup> See *infra* notes 92–124 and accompanying text.

during the following century and the opening decades of the present one.

First, the advent of legal realism, with its devaluation of legal concepts, gave rise to some of the most well-known criticisms of legal personhood, such as those written by John Dewey<sup>17</sup> and Felix Cohen.<sup>18</sup> In turn, realism morphed into the law and economics movement,<sup>19</sup> where, beginning in the 1970s, leading scholars such as Jensen, Meckling, Easterbrook, and Fischel treated corporate personhood as a “fiction,”<sup>20</sup> or as “a matter of convenience rather than reality,”<sup>21</sup> and promoted a view of the corporation as a rarefied “nexus of contracts,”<sup>22</sup> which gained wide traction.<sup>23</sup> Finally, in the United States Supreme Court, the twin cases of *Citizens United*<sup>24</sup> and *Hobby Lobby*<sup>25</sup> brought personhood into sharp

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<sup>17</sup> John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

<sup>18</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–14 (1935).

<sup>19</sup> See Hanoch Dagan & Benjamin C. Zipursky, *Introduction: The Distinction Between Private Law and Public Law*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 1, 7–9 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) (providing detailed analysis of the link between legal realism and law and economics); Henry E. Smith, *Complexity and the Cathedral: Making Law and Economics More Calabresian*, 48 EUR. J.L. & ECON. 43, 46–48 (2019) (same).

<sup>20</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

<sup>21</sup> FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991).

<sup>22</sup> See, e.g., Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 302 (1983) (“An organization is the nexus of contracts, written and unwritten, among owners of factors of production and customers.”).

<sup>23</sup> See, e.g., William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 409 (1989) (“The new economic theory’s core notion describes the firm as a legal fiction that serves as a nexus for a set of contracting relations . . . . This notion has achieved wide currency . . . . Some have accorded this notion the weight of scientific truth . . . .”).

<sup>24</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>25</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

public focus—and criticism.<sup>26</sup> This development was somewhat ironic, considering that in these cases, the Court mostly *ignored* corporate personhood<sup>27</sup> (in contrast to what state common law—the font of corporate law in the United States—clearly mandates).<sup>28</sup>

Although this skeptical, “reductionist-realist[]”<sup>29</sup> view of personhood might appear to be the general trend, it has also met commendable resistance. First, within personhood’s original home—the common law—state courts and legislatures, particularly in Delaware, have authored a robust, coherent line of doctrinal development where personhood continues to play a critical role.<sup>30</sup> Second, in law and economics literature, beginning with the groundbreaking work of Professors Henry Hansmann and Reinier Kraakman at the turn of the century,<sup>31</sup> a growing group of scholars<sup>32</sup> are

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<sup>26</sup> See, e.g., Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 309–12 (2015) (detailing various political and public debates through which “[c]orporate personhood is getting a bad name” in the United States).

<sup>27</sup> See, e.g., ADAM WINKLER, *WE THE CORPORATIONS* 364 (2018) (“Corporate personhood . . . is entirely missing from the [*Citizens United*] opinion. . . . [T]he *Citizens United* decision obscured the corporate entity and emphasized the rights of others, like shareholders and listeners.”).

<sup>28</sup> See *infra* Part III. The minimization of personhood in these Supreme Court cases likely resulted from the broader, and unwarranted, modern disconnect between federal law and the common law. For detailed analysis of this disconnect and what motivates it, see Chaim Saiman, *The Law Wants to Be Formal*, 96 NOTRE DAME L. REV. 1067 (2021); *infra* text accompanying notes 266–85.

<sup>29</sup> Avihay Dorfman, *On Trust and Transubstantiation*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 339, 355 (Andrew S. Gold & Paul B. Miller eds., 2014).

<sup>30</sup> See *infra* Part III.

<sup>31</sup> Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

<sup>32</sup> A foundational work in this area is REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA, MARIANA PARGENDLER, WOLF-GEORG RINGE & EDWARD ROCK, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (3d ed. 2017). At the start of the book, “legal personality” is described as a “core structural characteristic[]” of the corporation. *Id.* at 5. A related line of scholarship connects history with legal

exploring personhood's role in facilitating entrepreneurship, long-term business ventures, and other economic benefits, through concepts such as asset partitioning,<sup>33</sup> capital lock-in,<sup>34</sup> perpetual existence,<sup>35</sup> and the structure of corporate fiduciary duties.<sup>36</sup> Finally, the silver lining of *Citizens United* and *Hobby Lobby* has been a new wave of personhood scholarship, introducing a valuable interface with constitutional law and other areas of study.<sup>37</sup>

Despite all this, the various lines of literature do not seem to be connecting among themselves; personhood discourse develops within each policy or scholarly space, with inadequate attention being paid to the possibility of

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and economic theory of the firm. *See, e.g.*, EVA MICHELER, *COMPANY LAW: A REAL ENTITY THEORY* (2021); ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* (2013). Another related scholarly category is institutional law and economics, where the corporation is a leading type of institution being studied. *See, e.g.*, Simon Deakin, David Gindis, Geoffrey M. Hodgson, Kainan Huang & Katharina Pistor, *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 *J. COMPAR. ECON.* 188, 194–95 (2017) (“Legal incorporation means that the state recognizes the firm as a singular legal person with rights and duties. . . . The corporation itself is an owning agent; that is to say, ownership of the assets of the firm are vested in the legal person, the corporation. . . . The glue binding the corporation together is the power of corporate law . . . . [T]he corporation is not constituted by entrepreneurial administration of a production process, but by establishment of the singular legal person under which the entrepreneurs operate.”).

<sup>33</sup> *See, e.g.*, Hansmann & Kraakman, *supra* note 31; Ofer Eldar & Andrew Verstein, *The Enduring Distinction Between Business Entities and Security Interests*, 92 *S. CAL. L. REV.* 213 (2019).

<sup>34</sup> *See, e.g.*, Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 *UCLA L. REV.* 387 (2003).

<sup>35</sup> *See, e.g.*, Andrew A. Schwartz, *The Perpetual Corporation*, 80 *GEO. WASH. L. REV.* 764 (2012).

<sup>36</sup> *See, e.g.*, Elizabeth Pollman, *Startup Governance*, 168 *U. PA. L. REV.* 155, 218 (2019) (“The value of the corporation itself . . . best reflects the sum of the participants’ interests and it is to the corporation that the fiduciary duty should be owed.”).

<sup>37</sup> *See, e.g.*, Elizabeth Pollman, *Wrong Turns with Corporate Rights*, 98 *B.U. L. REV. ONLINE* 44, 44 n.1 (2018) (citing a wide range of recent works in the area of corporate constitutional rights and personhood).



personhood as a single, pre-existing concept—or, indeed, to why personhood keeps yielding *new* spaces of legal, economic, and social discussion.<sup>38</sup>

This Article is the first work of scholarship to offer a more unified theory of personhood. It argues that the various streams of jurisprudence and public debate mentioned above have all been discussing the exact same phenomenon, albeit from different angles. Personhood is a common law concept—predating both the Constitution and modern law and economics—which is just as conventional, and as central to legal and economic analysis, as other concepts, including “contract,” “property” or “agency.”<sup>39</sup> Departing from any mystical, Gierkean conceptions (the target of personhood’s most pointed criticisms),<sup>40</sup> this Article introduces personhood as both a product of, and contributor to, central canons of mainstream legal and economic thought, such as the primacy of law (which today is seeing renewed attention as part of the new private law (NPL) movement),<sup>41</sup> Hohfeldian rights and

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<sup>38</sup> See, e.g., Andrew Verstein, *Enterprise Without Entities*, 116 MICH. L. REV. 247, 297 (2017) (mentioning that “legal entities sometimes command constitutional rights in our society,” but doing so in a single sentence near the end of an article in the law and economics space). Similarly, the use of different words—mainly “personhood” and “entity,” and sometimes “firm” or other phrases—makes it harder to recognize that the exact same phenomenon is being discussed. See Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65 VILL. L. REV. 523, 526 n.4 (2020).

<sup>39</sup> Due to the same tendency to minimize personhood, which this Article aims to address, corporate law itself is often being conflated with precisely these three areas of law (contract, property, and agency law). See Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 GEO. MASON L. REV. 223, 231, 263–64 (2021).

<sup>40</sup> See, e.g., Joel Edan Friedlander, *Corporation and Kulturkampf: Time Culture as Illegal Fiction*, 29 CONN. L. REV. 31, 40, 76–83 (1996) (stating that “[i]n the late nineteenth century, the eminent German legal historian Otto Gierke theorized that when individuals unite, spiritually and psychologically, for a common purpose they create a separate, living person that has a will of its own” (footnote omitted); discussing Gierke’s “Theory of the Corporation as Group-Person”).

<sup>41</sup> See *infra* notes 61–76 and accompanying text.

duties,<sup>42</sup> the distinction between risk and uncertainty,<sup>43</sup> and the day-to-day practice of mergers, acquisitions, and fiduciary duties.<sup>44</sup> There is nothing odd about personhood, and legal participants should not hesitate to discuss it meaningfully, instead of resorting to analytically unworkable metaphors, such as “nexus of contracts,” shareholders as “owners,” or other “aggregate” theories.<sup>45</sup>

The unifying principle behind personhood’s dynamic role in legal and social life is that, as this Article is the first to explain, personhood is associated with a unique phenomenon: the moment the law makes an entity into a legal person, it creates a new *legal degree of freedom*, where rights and duties—the most familiar building blocks of legal analysis<sup>46</sup>—can flow to and from that person, rather than only between humans (as would have been the case in a world without artificial legal personhood). This degree of freedom, in turn, generates a large, unforeseeable array of potential future scenarios, which can manifest at all levels of human activity, whether legal, economic, social, cultural, technological, or otherwise. That is, the legal person represents a higher, more primordial stage of legal analysis than contracts, property, or any other thing that persons (human or otherwise) can create, modify, or affect and be affected by, *because* they are persons.

<sup>42</sup> See *infra* notes 46, 152–55 and accompanying text.

<sup>43</sup> See *infra* note 48 and accompanying text.

<sup>44</sup> See *infra* Part III; *infra* Section V.B.

<sup>45</sup> See, e.g., Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMPAR. L. 39, 42 (2000) (“The aggregate or partnership model of the corporation . . . assumed [a role as the ‘owners’ of the corporate enterprise] for shareholders, just as it assumed a principal/agent relationship between the shareholders as owners and their agent directors. . . . [T]he contemporary nexus of contracts theory of the corporation again speaks of a principal/agent relationship between shareholders and directors . . .”).

<sup>46</sup> See, e.g., Gideon Parchomovsky & Alex Stein, *Empowering Individual Plaintiffs*, 102 CORNELL L. REV. 1319, 1320 (2017) (“Our legal system is organized around the concepts of rights and duties.”); see also *id.* at 1320 n.1 (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), and stating that Hohfeld’s article provides “a classic account of this organization”).

Humans remain the *ultimate* beneficiaries of corporate law and of the corporation<sup>47</sup>—just as they ought to be the beneficiaries of *all* law—but the word “ultimate” is highly consequential: it means that at any point of the corporation’s life as a going concern, no one can (or *should* be able to) tell *when, in what way, or which* humans (shareholders, specific stakeholders, or others, whether presently identifiable or not) will reap the fruits of the corporation’s activities. In other words, personhood is the most potent catalyst for what Professor Henry Smith has called “intense interactions[, which] can lead to unforeseen . . . results.”<sup>48</sup>

To give one salient example, because their fiduciary duties run to the corporate entity (and not to any human), corporate managers have an exceptionally wide freedom of action, not encountered in other fields of law; as the Delaware Court of Chancery said, “[d]irectors are not thermometers, existing to register the ever-changing sentiments of stockholders”<sup>49</sup>—which they *would* have been if they served as agents, trustees, or other non-corporate law actors.<sup>50</sup>

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<sup>47</sup> See, e.g., Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1663 (“[W]e owe no allegiance to corporations . . . without reference to the idea that people are involved.”). For further discussion of the derivative, ultimate nature of other people’s claims toward the corporate entity, see *infra* note 367.

<sup>48</sup> Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1056 (2021). Smith’s full sentence refers to “unforeseen and undesired results,” *id.*, which fits with his discussion of equity’s corrective function. Consistent with this Article’s idea of personhood as a legal degree of freedom, personhood can give rise to both desired *and* undesired results, but in any event, those results are unforeseeable. Put differently, legal personhood is a leading facilitator of *uncertainty* (as opposed to *risk*), see FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 231–32 (1921) (describing risk as “an uncertainty which can by any method be reduced to an objective, quantitatively determinate probability,” as opposed to “true uncertainty,” which is “that higher form of uncertainty not susceptible to measurement” (emphasis omitted)).

<sup>49</sup> *In re Lear Corp. S’holder Litig.*, 967 A.2d 640, 655 (Del. Ch. 2008).

<sup>50</sup> See, e.g., RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf *and subject to the principal’s control* . . . .”

In fact, this is precisely what happened in *Twitter*: although some scholars, operating under personhood-minimizing conventions, have assumed that Twitter's directors were legally *bound* to pursue the merger in order to maximize shareholder wealth,<sup>51</sup> that is simply not the case. Under existing Delaware law, with the corporate entity at its center, the directors could cause Twitter to maintain the merger lawsuit, or abandon it altogether.<sup>52</sup> Twitter chose the former over the latter, which merely shows that it is impossible to predict what lawful choices a corporate person

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(emphasis added)); RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. L. INST. 2003) (“A trust . . . is a fiduciary relationship *with respect to property*, . . . subjecting the person who holds title to the property to duties to deal with it . . . *for one or more persons . . .*” (emphases added)); *see also* Ron Harris, *The History of Team Production Theory*, 38 SEATTLE U. L. REV. 537, 550 (2015) (“For directors not to hold their full alliance to members, they needed another anchor—the corporate entity.”); Mark Leeming, *Six Differences Between Trustees and Company Directors*, 94 AUSTL. L.J. 254 (2020); Cynthia A. Williams, *For Whom is the Corporation Managed and What is Its Purpose? A Stakeholder Perspective Based on the Law of Delaware*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 165, 173 (Elizabeth Pollman & Robert B. Thompson eds., 2021) (“Outside of voting for the board and proposing procedural by-law amendments, shareholders cannot direct the board to do anything, which is one argument against construing shareholders as the principal and the board as its legal agent, since the hallmark of a legal agency is control by the principal.” (footnotes omitted)).

<sup>51</sup> *See, e.g.*, Ann Lipton, *The Entire World Is About to Get a Lesson in Revlon*, BUS. L. PROF. BLOG (July 14, 2022), [https://lawprofessors.typepad.com/business\\_law/2022/07/the-entire-world-is-about-to-get-a-lesson-in-revlon.html](https://lawprofessors.typepad.com/business_law/2022/07/the-entire-world-is-about-to-get-a-lesson-in-revlon.html) [<https://perma.cc/29DN-CSE3>].

<sup>52</sup> *See, e.g.*, Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1275 (2001) (“The Delaware Model . . . provides corporate managers with the flexibility to do practically any lawful act, subject to judicial review focused on whether the managers were properly motivated and not irrational.”); Robert B. Thompson, *The New Unocal*, 65 ARIZ. L. REV. 695, 701 (2023) (“Delaware statutes give directors the power to pick a merger partner, determine the terms of the combination, or say no to any unwanted offer.”). For detailed discussion of this point, *see infra* text accompanying notes 361–69.

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(just like a human) will make.<sup>53</sup> This Article discusses many additional implications of personhood, illustrating why it is often a good idea to *not* be able to tell which, when, or in what way humans will benefit from a legal person's open-ended activities.

The Article proceeds as follows: Part II describes in detail how the idea of non-human legal personhood has developed in modern times, from its origins in the common law, through the tumult of legal realism and the early generation of law and economics, to the present-day (still incomplete) revival of substantive personhood discourse. Part III focuses on a legal scene where personhood is at the core of the law, and shapes an expanding body of high-profile cases: Delaware corporate law. Part IV presents the unifying theory which underlies all of these developments: personhood as a legal degree of freedom. Finally, Part V discusses the application of personhood theory, as developed in this Article, to several ongoing debates, including the dichotomy between shareholder primacy and corporate social responsibility, the literature on "agency costs," and recent federal litigation where personhood played a larger role than previously recognized.

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<sup>53</sup> An alternative explanation is that, due to the same culture of personhood minimization which this Article aims to address, Twitter's directors erroneously believed they owe their loyalty directly to shareholders, or were socially and psychologically motivated to maximize share prices in the short term. However, there is no real evidence for this assumption, particularly given the identity of the law firms that represented Twitter—some of which, such as Wachtell, Lipton, Rosen & Katz, have been instrumental in shaping how Delaware law mediates among corporate entities, shareholders, and fiduciaries, *see, e.g., The 1980s Takeover Era and Lipton's Stockholder Rights Plan*, THE LIPTON ARCHIVE, <https://theliptonarchive.org/1980s> [<https://perma.cc/X8P8-LP53>] (describing the firm's role in the hostile takeover debate of the 1980s, including its development of the poison pill based on the stated belief "that a corporation has the absolute right to . . . have a policy of remaining an independent entity").

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## II. THE TRAJECTORY OF PERSONHOOD DISCOURSE

### A. Substantive Personhood in the Common Law

Where do legal concepts come from? One possible answer, associated with early members of the influential legal realist movement, is that legal concepts do not come from anywhere at all—that they either do not, or should not, exist outside of pure imagination.<sup>54</sup> According to this view, judges and other legal decisionmakers should examine situations on a case-by-case basis, reaching the result they deem best on extra-legal grounds, whether economic, social, scientific, or otherwise.<sup>55</sup> Because legal concepts do not really matter, the theory goes, our world should be examined as the sum of directly accessible physical phenomena: for example, according to Judge Frank Easterbrook and Professor Daniel Fischel, leaders of the neo-realist<sup>56</sup> early generation of law and economics,<sup>57</sup> “Congress’ is a collective noun for a group of independent political actors and their employees.”<sup>58</sup> By extension, the same applies to

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<sup>54</sup> See, e.g., Cohen, *supra* note 18.

<sup>55</sup> See *id.* at 822 (calling for “eliminating supernatural terms and meaningless questions and redefining concepts and problems in terms of verifiable realities”), 843 (“A truly realistic theory of judicial decisions must conceive every decision as . . . a function of social forces, that is to say, as a product of social determinants and an index of social consequences. A judicial decision is a social event.”), 843–44 (“The distinction between ‘holding’ and ‘dictum’ in any decision is not to be discovered by logical inspection of the opinion or by historical inquiry into the actual facts of the case. . . . This is a question not of pure logic but of human psychology, economics and politics.”).

<sup>56</sup> See sources cited *supra* note 19.

<sup>57</sup> In this Article, the phrase “early law and economics” or “early generation of law and economics” refers primarily to works written from the 1970s to the 1990s. It is intended to contrast with later, more nuanced and law-oriented works in law and economics, such as those by Professors Hansmann and Kraakman and their successors. This usage is not meant to overlook even earlier literature in law and economics, such as Professor Ronald Coase’s foundational article, R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

<sup>58</sup> EASTERBROOK & FISCHEL, *supra* note 21, at 12.

other legal concepts, in both public and private law, including “contract,” “property,” and the easiest target, “personhood.”<sup>59</sup>

While this approach remains highly influential,<sup>60</sup> it has a meaningful alternative. This other view, today increasingly associated with the new private law (NPL) movement,<sup>61</sup> treats law as a *system*,<sup>62</sup> created through human thoughts and actions, but also possessing its own structure,<sup>63</sup> which can make certain statements about the law objectively right or wrong. For example, the sentence “a contract may be breached without remedy and without imposing any duty on the violator” contradicts the very definition of a contract: according to the Restatement (Second) of Contracts, “[a] contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”<sup>64</sup> The Restatement is

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<sup>59</sup> See *infra* Section II.B.

<sup>60</sup> See, e.g., Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 COLUM. L. REV. 16, 17 n.13 (2000) (describing the influence of Professor Cohen’s article, Cohen, *supra* note 18, on legal discourse).

<sup>61</sup> See, e.g., John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1651–63 (2012) (discussing “the core elements of the new thinking in private law,” in a part titled “The New Private Law”); Paul B. Miller, *The New Formalism in Private Law*, 66 AM. J. JURIS. 175, 175 (2021) (“Private law is resurgent in the United States. A growing group of scholars . . . are providing new theoretical perspectives on tort, property, contract, fiduciary law and other subjects under the banner of the New Private Law.”).

<sup>62</sup> See, e.g., Henry E. Smith, *Systems Theory: Emergent Private Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 143 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2021); see also Miller, *supra* note 61, at 185–86 (“Blackstone’s *Commentaries* are an effort to present English common law as a proper *system* of law, one with a decipherable structure built upon a particular conception of rights and remedies for wrongs.” (footnote omitted)).

<sup>63</sup> See, e.g., Smith, *supra* note 48, at 1142 (“After Legal Realism[,] . . . seeing law, especially private law, as having a structure goes against the grain. Nevertheless, we have the resources.”).

<sup>64</sup> RESTATEMENT (SECOND) OF CONTS. § 1 (AM. L. INST. 1981).

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a summation of common law rules and principles,<sup>65</sup> and in turn, the common law is the origin of contract law.<sup>66</sup>

The legal system constantly evolves,<sup>67</sup> but certain “ground norms”—including the defining building blocks of contract, property, corporate, and other areas of law—cannot be easily manipulated, nor is there a good reason (legal, economic, or otherwise) to modify them.<sup>68</sup> If we must justify the law’s structure in extra-legal terms, such justifications are abundant.<sup>69</sup>

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<sup>65</sup> See, e.g., Andrew S. Gold & Henry E. Smith, *Restatements and the Common Law*, in THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY 441, 441 (Andrew S. Gold & Robert W. Gordon eds., 2023) (“[T]he common law has been the target of the Restatement project, in its many phases.”). There is debate on whether the Restatements strictly *restate* the common law, rather than trying to reform it, but there can be little doubt that the two operate in closely related legal spaces, or that the Restatements mirror the common law (however imperfectly). See, e.g., Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 270 (2007).

<sup>66</sup> See, e.g., S. J. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW (1975).

<sup>67</sup> See, e.g., Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2141 (2022) (discussing the common law’s “mechanism of evolution and growth”).

<sup>68</sup> See, e.g., Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1244 (2015) (“Common law concepts have, at once, a *jural* meaning and a *normative* meaning. The *jural* meaning refers to the structural core undergirding a legal concept that enables its use by participants in legal discourse. . . . The *normative* meaning refers to the meaning that a legal concept and its *jural* meaning come to be cloaked in as a result of external interpretive influences, which may in turn be drawn from a variety of situational goals. The *normative* meaning does not displace the *jural* meaning of the concept but instead works in tandem with it to collectively enable the concept to be applied during adjudication. . . . [T]he *jural* meaning produc[es] the common law’s stability effect . . . . The *jural* meaning remains stable and operates as an anchor, enabling actors to build their expectations and plan their activities.”).

<sup>69</sup> For a canonical example, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (justifying a legal concept—the *numerus clausus* principle in property law, which limits the number of available forms of property rights, and forbids creating new forms through contract—



The overarching theme of the structural approach is that “[t]he law can *do things*; it can create numerous devices, from contracts to fiduciary duties to legal persons, none of which would be possible without law.”<sup>70</sup> The contract example provided above is a relatively tactile legal device, but nothing prevents the law from generating more foundational concepts, including *who* are the people that can be bound by contracts, or, more generally,<sup>71</sup> bear legal rights and duties. These concepts predate, and fundamentally shape, other legal and extra-legal systems—for example, the market,<sup>72</sup> or the economy as a whole.<sup>73</sup>

According to this understanding, the law can define its own subjects, whether or not they are directly accessible physical phenomena; for instance, it can define the very idea of a *legal person*, and include in that group both humans and other, legally-conceived entities.<sup>74</sup> As this Article explains, there is

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by analyzing the concept’s economic benefits, namely, the reduction of information costs).

<sup>70</sup> Asaf Raz, *Why Corporate Law Is Private Law*, 25 U. PA. J. BUS. L. 981, 1003–04 (2023). To be certain, the reference to the law’s ability to “do things” is slightly more idiomatic than the discussion below of persons’ primordial, first-order capacity to commit actions and shape reality (including creating and modifying legal norms), *see infra* text accompanying notes 146–55. Yet, the system of law is powerful enough to itself enable the creation of new (artificial) persons.

<sup>71</sup> *See* Parchomovsky & Stein, *supra* note 46, at 1320 (“Our legal system is organized around the concepts of rights and duties.”).

<sup>72</sup> *See, e.g.*, Hanoch Dagan, Avihay Dorfman, Roy Kreitner & Daniel Markovits, *The Law of the Market*, 83 L. & CONTEMP. PROBS. i, i (2020) (“[M]arkets arise out of and operate through law—not just through public regulation but also through private law regimes . . . that create entitlements, enforce market exchanges, and limit expropriation.”).

<sup>73</sup> *See* Ronald H. Coase, *The Institutional Structure of Production: Lecture to the Memory of Alfred Nobel*, NOBEL PRIZE (Dec. 9, 1991), <https://www.nobelprize.org/prizes/economic-sciences/1991/coase/lecture> [<https://perma.cc/3BRC-R8CK>] (“[T]he legal system [has] a profound effect on the working of the economic system and may in certain respects be said to control it.”). For more on “the constitutive role of law,” *see* Deakin et al., *supra* note 32.

<sup>74</sup> For discussion of law as a necessary condition for non-human personhood, *see, for example*, KRAAKMAN ET AL., *supra* note 32, at 31 (“[O]f the five defining characteristics of the corporate form, only one—legal

nothing mystical or “supernatural”<sup>75</sup> about this approach: at all times, the law *ultimately* exists to serve humans,<sup>76</sup> and it can do so in ways that look beyond immediate molecular reality, by operating as a system which is capable, among other things, of attaching one kind of legal concept (rights, duties, and other traits) to another (legal persons).

Unsurprisingly, over the long arc of its development, the common law has done precisely that. The historical starting point for legal personhood can generally be located in one of two places: the first, according to Professors Henry Hansmann, Reinier Kraakman and Richard Squire, is ancient Rome, where the *societas publicanorum* exhibited several characteristics of the modern legal entity.<sup>77</sup> This legal form, however, was curtailed in both its availability and function (for one thing, it could only do business with the state), which limits its historical significance.<sup>78</sup>

Another, somewhat clearer starting point can be found in the common law<sup>79</sup> of post-medieval England: according to a

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personality—clearly requires special rules of law.”); Paul B. Miller, *Corporate Personality, Purpose, and Liability*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 50, at 222, 223 (“[T]he law constitutes corporate persons and enables genuinely corporate purposive action . . .”).

<sup>75</sup> Cohen, *supra* note 18 *passim*.

<sup>76</sup> See *supra* note 47 and accompanying text.

<sup>77</sup> See Hansmann et al., *supra* note 10, at 1360–61.

<sup>78</sup> See *id.* at 1362–64. Although the historical and doctrinal analysis in this Article focuses on legal personhood in the common law, an equally impressive tradition has developed in civil law. For discussions of legal personhood and its implications in civil law jurisdictions, see generally KRAAKMAN ET AL., *supra* note 32 *passim*. The *theoretical* analysis in this Article, see *infra* Part IV; *infra* Section V.A, applies to legal personhood globally.

<sup>79</sup> In this Article, the phrase “common law” refers not merely to case law (which is one possible use of the term), but more broadly to the legal system or tradition known as the common law. In this system, many different sources of legal norms exist and interact with one another, including legislation, case law, regulation, equity, and others (such as the Restatements, see, e.g., Balganes, *supra* note 67). Specifically, corporate law is a legislation-heavy area of the common law, and corporate law statutes (for example, the Delaware General Corporation Law, DEL. CODE

seminal work by Professor Ron Harris, “by the sixteenth century, . . . [i]ncorporation involved the creation of a new personality, distinct from that of individual human beings.”<sup>80</sup> Harris’s book then discusses the numerous implications of the corporation’s legal personhood up to the nineteenth century.<sup>81</sup> In a 2003 article,<sup>82</sup> also focusing on the nineteenth century, Professor Margaret Blair provided a detailed survey of legal personhood’s doctrinal development, and its economic and social implications—specifically, how “[e]ntity status . . . made it possible to build lasting institutions”<sup>83</sup> by locking capital into the entity, which was not available under partnership law or other non-personhood-based legal frameworks.

As Harris’s and Blair’s works illustrate, the body of common law on legal personhood has become voluminous from a relatively early period. The remainder of this Section highlights three specific examples, demonstrating the relative ease—especially compared to the realist and neo-realist environment of the twentieth century<sup>84</sup>—with which nineteenth century courts, on both sides of the Atlantic, utilized legal personhood in their decisions. The cases discussed below exemplify this Article’s idea of personhood as a legal degree of freedom:<sup>85</sup> they treat personhood as an ex ante “ground norm,” which then manifests in a variety of factual contexts.

Importantly, each of the three cases discussed in this Section—*Smith v. Hurd*,<sup>86</sup> *Foss v. Harbottle*,<sup>87</sup> and *Hawes v.*

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ANN. tit. 8) should be read as “common law statutes,” Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608 *passim* (2022).

<sup>80</sup> RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720-1844*, at 17–18 (2000).

<sup>81</sup> *See id. passim*.

<sup>82</sup> Blair, *supra* note 34.

<sup>83</sup> *Id.* at 454.

<sup>84</sup> *See infra* Section II.B.

<sup>85</sup> *See infra* Part IV.

<sup>86</sup> 53 Mass. (12 Met.) 371 (1847).

<sup>87</sup> (1843) 67 Eng. Rep. 189; 2 Hare 461 (Eng.).

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*Oakland*<sup>88</sup>—maps into each of the three main spaces of *current* discourse on legal personhood:<sup>89</sup> law and economics literature, Delaware doctrine, and the debate over the Supreme Court’s decisions on corporate rights, respectively. In some of these early cases, the courts attempt to justify their use of non-human personhood, illustrating how the concept has economic and practical implications that extend beyond legal doctrine alone. Indeed, these nineteenth-century cases offer a preemptive response to the realist critique of legal concepts, and align to some degree with the present-day methodology of the new private law,<sup>90</sup> by “considering both internal and external points of view in analyzing the law.”<sup>91</sup>

First, in the 1847 case of *Smith v. Hurd*,<sup>92</sup> heard in the Supreme Judicial Court of Massachusetts, the court was asked to decide whether a shareholder of the Phoenix Bank could maintain a direct, personal action against the corporation’s directors, for allegedly causing “the whole capital of the bank” to be “wasted and lost.”<sup>93</sup> Chief Justice Lemuel Shaw, writing for the court, needed only two pages of the case reporter to offer an exceptionally well-organized summary of corporate law’s structure, with legal personhood at its center:

There is no legal privity, relation, or immediate connexion, between the holders of shares . . . and the directors . . . . The bank is a corporation and body politic, having a separate existence as a distinct person in law . . . . The very purpose of incorporation is, to create such legal and ideal person in law, distinct from all the persons composing it, in order to avoid the extreme difficulty, and perhaps . . . the utter impracticability, of such a number of persons acting

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<sup>88</sup> 104 U.S. 450 (1882).

<sup>89</sup> See *infra* Section II.C; *infra* Part III.

<sup>90</sup> See *supra* notes 61–76 and accompanying text.

<sup>91</sup> Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith, *Introduction*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW, *supra* note 62, at xv, xv.

<sup>92</sup> 53 Mass. (12 Met.) 371 (1847).

<sup>93</sup> *Id.* at 383.

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together in their individual capacities. . . . [T]he directors are the appointees of the corporation, not of the individuals. . . . [S]tockholders . . . are members of an organized body, and exercise such powers as the organization of the institution gives them. . . . [T]he injury done to the capital stock by wasting, impairing and diminishing its value, is not, in the first instance, nor necessarily, a damage to the stockholders. All sums which could, in any form, be recovered on that ground, would be assets of the corporation . . . .<sup>94</sup>

The case was accordingly dismissed.<sup>95</sup> Thus, as early as 1847, one of the nation's leading common law courts was able to decide a high-stakes dispute, of substantial economic value,<sup>96</sup> based on not much more than the fact that the corporation is a legal person. This was no formalistic accident: the court's reference to "the extreme difficulty, and perhaps . . . the utter impracticability"<sup>97</sup> of attempting to obtain the corporation's practical benefits without legal personhood would squarely fit with the post-realist writings of Hansmann, Kraakman, and other leading figures in the present-day discussion on personhood.<sup>98</sup>

Yet, after reading *Smith v. Hurd*, a disturbing question remains: could the directors truly escape all judicial scrutiny of their actions, merely because no shareholder—necessarily separate from the corporate entity—would ever be able to maintain a personal lawsuit against them? Toward the end of his opinion, Chief Justice Shaw offered "that stockholders have a remedy, a theoretic one indeed, and perhaps often inadequate, in the power of the corporation, in its corporate capacity, to obtain redress for injuries done to the common

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<sup>94</sup> *Id.* at 384–85.

<sup>95</sup> *See id.* at 387.

<sup>96</sup> *See id.* at 372 (stating that, according to the plaintiff's pleading, "the Phoenix Bank . . . [was incorporated] with a capital of three hundred thousand dollars").

<sup>97</sup> *Id.* at 384.

<sup>98</sup> *See infra* text accompanying notes 235–50.

property.”<sup>99</sup> This possibility, however, was not as theoretical as the court seemed to believe.

Four years earlier, in a case arising from a similar factual background, the English Court of Chancery—loyal to the common law’s mission<sup>100</sup> of “evolution and growth”<sup>101</sup> in response to “a variety of situational goals”<sup>102</sup>—discussed the solution to this problem, and the procedural cornerstone of modern corporate law:<sup>103</sup> the derivative action. In *Foss v. Harbottle*,<sup>104</sup> Vice Chancellor James Wigram relied on the understanding, also advocated in this Article, of personhood status as an ex ante legal fact, and used it as the anchoring point of the analysis:

It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, *prima facie*, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative.<sup>105</sup>

The *Foss* opinion then laid out both the rule—that “the directors are made the governing body”<sup>106</sup>—and the equitable exception: an “injury to a corporation . . . , for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such

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<sup>99</sup> *Smith v. Hurd*, 53 Mass. at 387.

<sup>100</sup> Note that, as the terms are used in this Article, there is no contrast between “common law” and “equity” (the latter, in the historical sense, being the Court of Chancery’s domain). See *supra* note 79.

<sup>101</sup> Balganesch, *supra* note 67, at 2141.

<sup>102</sup> Balganesch & Parchomovsky, *supra* note 68, at 1244.

<sup>103</sup> See, e.g., *infra* notes 344–50 and accompanying text.

<sup>104</sup> (1843) 67 Eng. Rep. 189; 2 Hare 461 (Eng.).

<sup>105</sup> *Id.* at 202.

<sup>106</sup> *Id.* at 203.

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character the protection of those rights to which in their corporate character they were entitled.”<sup>107</sup>

Throughout this analysis, the court vigilantly observed the reality of the corporation’s legal personhood: in the ordinary setting, the wrongdoing actors may be sued by the corporation itself,<sup>108</sup> and the injury is explicitly “to [the] corporation.”<sup>109</sup> In the exceptional case of a derivative action, the shareholder is “appointed to be [the corporation’s] representative,”<sup>110</sup> and the suit is brought to vindicate the rights attached to the “corporate character.”<sup>111</sup> The “only question”<sup>112</sup> is whether the procedure meant to benefit *the corporation* would be direct or derivative. This exact understanding remains a foundation of Delaware law today.<sup>113</sup>

Summarizing this group of cases, the 1882 *Hawes v. Oakland*<sup>114</sup> opinion demonstrates how the broad, substantive understanding of legal personhood was not limited to state courts, but sounded as clearly in the U.S. Supreme Court. In a dispute over the federal courts’ power to hear a shareholder’s lawsuit (based on harm done to the corporation), despite possible lack of diversity jurisdiction (both the corporation and the defendants were citizens of California, while the

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<sup>107</sup> *Id.*

<sup>108</sup> The derivative action remains the common method for litigating breaches of corporate fiduciary duties, but in many other cases, the corporation itself directly brings a lawsuit against the alleged wrongdoers. *See, e.g.,* CBS Corp. v. Nat’l Amusements, Inc., C.A. No. 2018-0342-AGB, 2018 Del. Ch. LEXIS 157 (Del. Ch. May 17, 2018) (case filed by CBS Corporation, through the majority of directors serving on its board, against other directors and the controlling shareholder, claiming the defendants have violated their fiduciary duties in connection with a proposed merger).

<sup>109</sup> *Foss*, 67 Eng. Rep. at 203.

<sup>110</sup> *Id.* at 202.

<sup>111</sup> *Id.* at 203.

<sup>112</sup> *Id.* at 202.

<sup>113</sup> *See infra* notes 344–50 and accompanying text. For a comprehensive study of the influence of English common law on the development of Delaware corporate law, see DAVID KERSHAW, *THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW* (2018).

<sup>114</sup> 104 U.S. 450 (1882).

shareholder resided in New York),<sup>115</sup> Justice Samuel Miller offered this reasoning for affirming the dismissal of the case:

This corporation, like others, is created a body politic and corporate . . . . [It] may make contracts, commit torts, and incur liabilities, and may sue or be sued in [its] corporate name in regard to all of these transactions. The parties who deal with [the corporation] understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.<sup>116</sup>

The *Hawes* opinion provides an opportunity to observe how the Court originally lifted the concept of legal personhood from the common law, applying it as-is in the federal setting.<sup>117</sup> Today, following the *Citizens United* and *Hobby Lobby* saga, many authors tend to think of legal personhood solely as a current-events topic of constitutional debate; given the problematic, ahistorical reasoning in these cases,<sup>118</sup> those authors inadvertently miss the broader meaning of personhood.<sup>119</sup> In fact, the *Hawes* decision—with its robust understanding of personhood, which aligns with the structural approach of common law cases such as *Smith v.*

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<sup>115</sup> See *id.* at 450–51.

<sup>116</sup> *Id.* at 453–54.

<sup>117</sup> The *Hawes* decision cites a broad array of common law cases on personhood, including *Foss v. Harbottle*. See *Hawes*, 104 U.S. at 454–57.

<sup>118</sup> See *infra* text accompanying notes 251–90.

<sup>119</sup> See, e.g., Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1321–22 (2021) (“The personhood theory of the corporation is articulated most frequently in connection with cases concerning the legal rights of the corporation. Although some scholars draw upon these cases for the principle that a corporation should be recognized as a legal person . . . , such a reading misconstrues the rationale behind the decisions. The Supreme Court’s jurisprudence in these cases . . . provides rights to corporations to protect shareholder individuals. . . . Thus, we find no rationale for corporate purpose in . . . the corporate personhood literature.” (footnotes omitted)).



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*Hurd* and *Foss v. Harbottle*<sup>120</sup>—was written four years before the Court began developing its current line of jurisprudence on corporate constitutional rights, in 1886’s *Santa Clara*<sup>121</sup> decision.<sup>122</sup>

Put simply, the concept of personhood came into federal law from the common law,<sup>123</sup> and then continued manifesting in new, open-ended ways (including the debate over corporate rights). The same underlying principle enables personhood to play so many roles, in all settings, federal, common law, or otherwise: personhood’s function as a legal degree of freedom.<sup>124</sup> To a large extent, it was this very malleability that irked the next two generations of personhood commentators, discussed in the following Section: the legal realists and early law-and-economists.

## B. Personhood in the Twentieth Century: Legal Realism and Early Law and Economics

The previous Section has illustrated how non-human personhood became a well-recognized part of the law throughout the nineteenth century. Yet, unlike concepts such as contract or property, which most authors took at face value (as they do today),<sup>125</sup> there was something about personhood that academics and practitioners just refused to fully acknowledge. This Section discusses the works of seven

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<sup>120</sup> See *supra* notes 92–113 and accompanying text.

<sup>121</sup> *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

<sup>122</sup> See Evelyn Atkinson, *Frankenstein’s Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 VA. L. REV. 581, 585–86 (2022) (discussing the *Santa Clara* case as the beginning of the Supreme Court’s expansion of constitutional rights for corporations); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1689–94 (2015) (same).

<sup>123</sup> Note that the same applies to other common law concepts mentioned in the Constitution, such as “[c]ontracts,” U.S. CONST. art. I, § 10, cl. 1, and “property,” *id.* amends. V, XIV, § 1. The Constitution nowhere defines what contract, property, or corporate law are, but all serve as a pre-existing norm on which constitutional interpretation and rights are built.

<sup>124</sup> See *infra* Part IV.

<sup>125</sup> See, e.g., Raz, *supra* note 39, at 263 (describing contract law as “more intuitive” than corporate law).

authors—Victor Morawetz, John Dewey, Felix Cohen, Michael Jensen, William Meckling, Frank Easterbrook, and Daniel Fischel—whose various misconceptions of personhood continue to affect present-day discourse on the topic. This Section also provides a detailed analytical response to each author, demonstrating how their arguments can be refuted using a combination of logic and well-established legal theory.<sup>126</sup> This analysis, in turn, supports the discussion in Section II.C and Parts III, IV and V below.

In his 1882 book, renowned American jurist<sup>127</sup> Victor Morawetz argued that “the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.”<sup>128</sup> Apparently, it mattered little to Morawetz that in the same year, the nation’s highest court said precisely the opposite;<sup>129</sup> in the second edition of his book, he added that “a corporation is really an association formed by the agreement of its shareholders, and . . . the existence of a corporation as an entity, independently of its members, is a fiction.”<sup>130</sup> Hawes, the shareholder who was told by the Supreme Court he has no right to create diversity jurisdiction and pursue a case on

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<sup>126</sup> See, e.g., Parchomovsky & Stein, *supra* note 46, at 1320 (“Our legal system is organized around the concepts of rights and duties.”), 1320 n.1 (citing Hohfeld, *supra* note 46, and stating that Hohfeld’s article provides “a classic account of this organization”).

<sup>127</sup> See David Ciepley, *The Anglo-American Misconception of Stockholders as ‘Owners’ and ‘Members’: Its Origins and Consequences*, 16 J. INSTITUTIONAL ECON. 623, 638 (2020) (describing Morawetz as a “prominent corporate lawyer” and his book as a “popular corporate law treatise”).

<sup>128</sup> VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE 2 (1882), *quoted in* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1458 (1987).

<sup>129</sup> See *Hawes v. Oakland*, 104 U.S. 450, 453–54 (1882); see also *supra* text accompanying notes 114–22 (discussing the *Hawes* opinion).

<sup>130</sup> 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS iii (2d ed. 1886).

behalf of a corporation situated on the opposite coast,<sup>131</sup> would have surely found comfort in Morawetz's words.

Yet, Morawetz's contentions also illuminate a certain tendency, persisting to this day,<sup>132</sup> that predates even legal realism (where similar arguments were later made on a more systemic, and ideological, basis). This tendency is the refusal to accept that A is A—or that a concept is just what it is, and cannot become the subject of hand-waving metaphors that run counter to the concept's core meaning. Under the weight of the cases surveyed in Section II.A above, and ample others, Morawetz admitted that “the fiction of a corporate entity has important uses and cannot be dispensed with,”<sup>133</sup> but immediately added that “it is nevertheless essential to bear in mind distinctly that the rights and duties of an incorporated association are, in reality, the rights and duties of the persons who compose it, and not of an imaginary being.”<sup>134</sup>

This statement, however, is a nullity: the two parts of the sentence cancel each other out. If there is a corporate entity, it bears rights and duties;<sup>135</sup> and if the rights and duties are borne directly by the members, there is no entity, and the members (shareholders) can neither enjoy the benefits (such as limited liability),<sup>136</sup> nor face the limits (such as capital lock-in),<sup>137</sup> associated with the existence of a separate legal person. Describing personhood as a “fiction” is about as useful as describing contract as a fiction, where “two people can scribble on a piece of paper and thereby invoke the police power of the state,” or property as a fiction where “imaginary boundaries

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<sup>131</sup> See *Hawes*, 104 U.S. at 462.

<sup>132</sup> For example, recent attempts to describe the foundational documents of a corporation (the corporate charter and bylaws) as a “contract” ignore the very definition of a contract under contract law. See Raz, *supra* note 39, at 268–69, 273, 281–82.

<sup>133</sup> MORAWETZ, *supra* note 130, at iii.

<sup>134</sup> *Id.*

<sup>135</sup> See *infra* text accompanying notes 146–55.

<sup>136</sup> See, e.g., Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 480 (“[L]imited liability is a consequence of the entity theory of the corporation and the law’s rejection of the associational theory of the corporation.”).

<sup>137</sup> See Blair, *supra* note 34.

are drawn around physical objects.” In reality, contract and property law have a structure that goes beyond these reductionist metaphors: legal concepts such as the requirement of definiteness,<sup>138</sup> or the *numerus clausus* principle,<sup>139</sup> generate consistent, practical, and often beneficial outcomes in daily life. The exact same applies to legal personhood.

It is clear, therefore, why a full-blown attack on legal concepts—and perhaps on *all* concepts<sup>140</sup>—was needed in order to deal a more severe strike to legal personhood (or at least to its perception by scholars). Fittingly, the first volley came from the hands of a philosopher. Against the background of new philosophical movements, mainly logical positivism,<sup>141</sup> John Dewey’s 1926 article<sup>142</sup> argued that “for the purposes of law the conception of ‘person’ is a legal conception; put roughly, ‘person’ signifies what law makes it signify.”<sup>143</sup> Dewey also believed that the law does not have much conceptual structure extending beyond immediate physical reality: “Any [right-and-duty-bearing] unit would be a person; such a statement would be truistic, tautological. Hence it would convey no implications, except that the unit has those rights and duties which the courts find it to have.”<sup>144</sup> He

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<sup>138</sup> See, e.g., James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 279 n.91 (2015) (“[T]he requirement of definiteness is not a matter that the parties can waive if they are to have a contract. Indeed, it is tautological to argue that the parties can agree to an indefinite level of performance, since there cannot be an agreement if parties do not know to what they have agreed.”).

<sup>139</sup> See, e.g., Merrill & Smith, *supra* note 69.

<sup>140</sup> See Cohen, *supra* note 18, at 825 (“High school students are still taught to subtract the integer seven from the integer two, which is logically impossible. An integer is the number of a class, and obviously a class of seven members cannot be contained in, or subtracted from, a class of two members. . . . [T]he mathematical fiction . . . represents a confused perception of a significant fact . . .”).

<sup>141</sup> See, e.g., Waldron, *supra* note 60, at 19 (“[T]he logical positivist movement in early-twentieth-century philosophy . . . aimed to rid scientific and philosophical language of terms that lacked empirical meaning.”).

<sup>142</sup> Dewey, *supra* note 17.

<sup>143</sup> *Id.* at 655.

<sup>144</sup> *Id.* at 656.

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concluded with a call for “eliminating the *idea* of personality until the concrete facts and relations involved have been faced and stated on their own account.”<sup>145</sup>

Dewey, however, might have mistaken the cause for the effect. He overlooked the possibility that courts invoke rights and duties *because* the unit in front of them is, in the first place, a legal person. To understand this, consider how many legal concepts are *not* persons, and cannot bear rights and duties: a contract *generates* rights and duties *for* persons;<sup>146</sup> property is the *object* of rights and duties borne *by* persons;<sup>147</sup> an agency relationship is the sum of rights and duties again borne by persons (the principal and agent).<sup>148</sup> These are all norms, relationships, or matters which require, *ex ante*, the existence of persons who *do something* about them, who enjoy or suffer because of them, who create, sign, or terminate them. In the ongoing FTX bankruptcy case, the law recognizes only actual *entities*, such as FTX Trading Ltd. and Alameda Research LLC, as parties to the court proceedings; the cryptocurrency tokens themselves were not, and could not be, declared bankrupt, nor can they bear other rights and duties.<sup>149</sup> Courts cannot levy a fine on a contract, a piece of

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<sup>145</sup> *Id.* at 673.

<sup>146</sup> *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 1 cmt. c (AM. L. INST. 1981) (“A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises.”).

<sup>147</sup> *See, e.g.*, Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012) (“[P]roperty [has an] in rem character—availing against persons generally.”).

<sup>148</sup> *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control . . .”).

<sup>149</sup> *See, e.g.*, Declaration of John J. Ray III in Support of Chapter 11 Petitions and First Day Pleadings at 30, *In re FTX Trading Ltd.*, No. 22-11068-JTD (Bankr. D. Del. Nov. 17, 2022), <https://d1e00ek4ebabms.cloudfront.net/production/uploaded-files/fdd-52615f0a-fb09-41ce-a398-b97b20bc1c36.pdf> [<https://perma.cc/BJT6-5D36>] (providing an organizational chart of the entities involved in the case, all of which are traditional entities with suffixes such as “Inc.,” “Ltd.,” “LLC,” and

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property, an agency relationship, or a crypto token, nor issue an injunction ordering it to stop behaving in a certain manner, nor revoke its professional license.<sup>150</sup>

Those sanctions are reserved to persons, because they relate to persons' capacity to *shape reality*, to affect and be affected by the world around them, in a manner which (among other things) produces or modifies contracts, objects of property, and legal relationships. Without referring to personhood, it is impossible to state "the concrete facts and relations involved . . . on their own account,"<sup>151</sup> since personhood itself is a prerequisite for those facts and relations. Both in physical terms, and in the hierarchy of legal concepts, persons represent a higher, more primordial degree of freedom than the other, *resulting* concepts (contracts, property, relationships, and so forth). In fact, this understanding was the foundation of Professor Wesley Hohfeld's 1913 article<sup>152</sup> (which Dewey did not cite), today considered "a classic account"<sup>153</sup> of the manner in which "[o]ur legal system is organized around the concepts of rights and duties":<sup>154</sup> while Hohfeld's article does, indeed, offer an elemental taxonomy of rights and duties, it builds upon the preliminary assumption "that a legal relation is always between two persons . . . . [I]f someone has a Hohfeldian right, another person has a duty."<sup>155</sup>

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so on; also listing the locations of corporation registrars where each entity is registered, such as Delaware, Antigua, and others).

<sup>150</sup> In the field of maritime law (or admiralty law), ships are represented as parties in court proceedings, and can bear rights and duties for additional purposes. As Professor Robert Anderson recently observed, this indicates that ships are legal persons (although, being a single physical object, they can probably engage in a less open-ended range of endeavors than their corporate siblings). See Robert Anderson, *The Sea Corporation*, 108 CORNELL L. REV. 1569, 1594–95, 1625–27 (2023).

<sup>151</sup> Dewey, *supra* note 17, at 673.

<sup>152</sup> Hohfeld, *supra* note 46.

<sup>153</sup> Parchomovsky & Stein, *supra* note 46, at 1320 n.1.

<sup>154</sup> *Id.* at 1320.

<sup>155</sup> Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 239–40 (2002). For a similar statement, see Alex Stein, *Second-Personal Evidence*, in PHILOSOPHICAL FOUNDATIONS

In any event, Dewey's attack on legal personhood was fairly well-mannered compared to that delivered, less than a decade later, by Professor Felix Cohen.<sup>156</sup> A law review standard,<sup>157</sup> Cohen's article did not limit itself to legal personhood, or any other single legal concept, *per se*. Like Dewey's work, it "resonate[d] with the logical positivist movement in early-twentieth-century philosophy"<sup>158</sup> (and likely with up-and-coming postmodernism, as well),<sup>159</sup> by requiring the elimination of *any* "concepts which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow."<sup>160</sup> Cohen added that "[a]ny word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it."<sup>161</sup>

Many criticisms can be, and have been,<sup>162</sup> leveled against Cohen's argument—including the fact that *no* field of human activity (such as "psychology, economics and politics"<sup>163</sup>) is possible without concepts; that each and every word in Cohen's article is itself a concept; and that some (such as "bankrupt") are even *legal* concepts—but here it is useful to dissect the manner in which Cohen approached his first,

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OF EVIDENCE LAW 96, 96 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021) ("Hohfeld's scheme of jural opposites and correlatives unfolded analytical proof that every legal entitlement ultimately transforms into a person's right, or lack thereof . . .").

<sup>156</sup> Cohen, *supra* note 18.

<sup>157</sup> See Waldron, *supra* note 60, at 18 n.13 (stating that, as of 1996, "Cohen's article is apparently the 72nd most cited article ever written in a law review" (citing Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996))).

<sup>158</sup> *Id.* at 19.

<sup>159</sup> See James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 515–16 (1991) (stating that, in the context of "talk[ing] of the legal subject," "Cohen and Foucault are in complete agreement").

<sup>160</sup> Cohen, *supra* note 18, at 823.

<sup>161</sup> *Id.*

<sup>162</sup> See, e.g., Waldron, *supra* note 60.

<sup>163</sup> Cohen, *supra* note 18, at 844.

supposedly most entertaining target: legal personhood.<sup>164</sup> Cohen focused on two cases for that purpose, *Tauza v. Susquehanna Coal Company*<sup>165</sup> and *United Mine Workers v. Coronado Coal Company*.<sup>166</sup> In the former, the New York Court of Appeals considered a question of personal jurisdiction, after a corporation registered in Pennsylvania was sued in New York.<sup>167</sup> In the latter, the U.S. Supreme Court contemplated “whether employers whose business had been injured in the course of a strike could recover a judgment against a labor union which had ‘encouraged’ the strike, or whether suit could be brought only against particular individuals charged with committing or inducing the injury.”<sup>168</sup>

In regard to the first case, Cohen argued that the court should have only considered practical factors such as “the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation . . . , [or] the possible hardship to corporations of having to defend actions in many states, considering the legal facilities available to corporate defendants.”<sup>169</sup> As to the second, Cohen believed that those factors included whether “labor unions would be seriously handicapped by the imposition of financial responsibility . . . , [or whether] it would be impossible for labor unions to control *agents provocateurs*, [or whether] labor unions served a very important function . . . which would be seriously endangered by the type of liability in question.”<sup>170</sup>

What Cohen, somewhat like Dewey,<sup>171</sup> failed to consider is that the law’s definition of the corporation, or the labor union, as a separate legal person is the preliminary assumption upon which all of those possibilities rest. Precisely *because* the

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<sup>164</sup> See *id.* at 809–14.

<sup>165</sup> 115 N.E. 915 (N.Y. 1917).

<sup>166</sup> 259 U.S. 344 (1922).

<sup>167</sup> See Cohen, *supra* note 18, at 809–10.

<sup>168</sup> *Id.* at 813.

<sup>169</sup> *Id.* at 810.

<sup>170</sup> *Id.* at 813.

<sup>171</sup> See *supra* text accompanying notes 141–55.



corporation or union is a person, it can be sued, defend against suits, be handicapped by financial liability, control agents (provocateurs or otherwise), or serve an important social function, which could not be served by employees acting individually. It can also do a multitude of other things, many of which unimagined by anyone before the fact.<sup>172</sup> Without the idea of artificial legal personhood, only humans would be present in the legal universe, and would be directly exposed to those lawsuits, liabilities, and risks.

Put simply, *the legal concept itself generates the beneficial real-world outcomes sought in the first place.*<sup>173</sup> Going to the core of Cohen's argument, legal personhood *does* "pay up in the currency of fact, upon demand."<sup>174</sup> Various aspects of legal personhood, such as limited liability, asset and regulatory partitioning (relevant to both the *Tauza* and *Coronado* cases), capital lock-in, and perpetual existence, although academically "discovered" only in later decades,<sup>175</sup> enable many of the social objectives Cohen strived to advance in 1935. Ultimately, his criticism of personhood rested on not much more than provoking the jocular tendency which some people instinctively experience when thinking about the idea of a non-human person<sup>176</sup>—the same tendency that would later shape much of the public debate following *Citizens United* and *Hobby Lobby*.<sup>177</sup>

Cohen's article is one of the more extreme instances of early legal realism, but there is little doubt that legal realism remains deeply influential in the United States.<sup>178</sup> For about

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<sup>172</sup> See *infra* Part IV.

<sup>173</sup> See, e.g., Raz, *supra* note 70, at 983–84, 1002; *supra* notes 138–39 and accompanying text.

<sup>174</sup> Cohen, *supra* note 18, at 823.

<sup>175</sup> See *infra* text accompanying notes 235–50.

<sup>176</sup> Cf. Miller, *supra* note 61, at 183 ("Cohen knew the power of well selected examples . . . . Thus, his arguments were developed not in relation to fundamental private law or the work of particular scholars but, rather, with special attention to corporate law and the (still intricate, and apt to confound) legal conceptualization of corporations as persons.").

<sup>177</sup> See *infra* text accompanying notes 251–90.

<sup>178</sup> See, e.g., Shyamkrishna Balganesh, Foreword, *The Constraint of Legal Doctrine*, 163 U. PA. L. REV. 1843, 1844 (2015) ("As the dominant

forty years after the publication of Cohen's article, a relative lull occurred in discussions of the corporation's legal personhood, and of corporate theory as a whole.<sup>179</sup> In the mid-1970s, the debate renewed itself, with the re-emergence of legal realism in a new form: the early generation of the law and economics movement.<sup>180</sup>

The first major step was Professors Michael Jensen and William Meckling's extremely well-cited<sup>181</sup> 1976 article,<sup>182</sup> which combined economic analysis of the firm with (presumably) legal assertions about the nature of the corporation. Jensen and Meckling's article offered a sweeping array of statements, including that "[t]he private corporation

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approach to legal analysis in the United States today, Legal Realism is firmly ensconced in the way scholars discuss and debate legal issues and problems. The phrase 'we are all realists now' is treated as cliché precisely because it is in some ways taken to state an obvious reality about the mindset of American legal scholars." (footnote omitted)).

<sup>179</sup> See, e.g., Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962) ("[C]orporation law, as a field of intellectual effort, is dead in the United States. . . . We have nothing left but our great empty corporation statutes. . . . [These are] shivering skeletons."). For an article countering Manning's statement, and discussing developments in U.S. corporate law during the immediate post-war decades, see Harwell Wells, "Corporation Law is Dead": *Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305 (2013). In any event, Wells wrote that he "found no evidence of greatly renewed interest in corporate personhood" during those decades. *Id.* at 332 n.118.

<sup>180</sup> See sources cited *supra* note 19 (describing the historical and ideological connection between legal realism and early law and economics).

<sup>181</sup> See Brian R. Cheffins, *What Jensen and Meckling Really Said About the Public Company*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 50, at 2, 2–3 ("'Theory of the Firm' [is] probably the most widely cited academic article that engages with corporate personhood and corporate purpose. . . . It is currently one of the most-referenced papers in various fields, including economics, finance, accounting and corporate governance, and may well be the most cited article ever about business. According to Google Scholar, 'Theory of the Firm' has been cited more than 100,000 times. . . . Again according to Google, 'Theory of the Firm' was cited nearly 10,000 times in 2020 alone." (footnote omitted)).

<sup>182</sup> Jensen & Meckling, *supra* note 20.

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or firm is simply one form of legal fiction which serves as a nexus for contracting relationships,”<sup>183</sup> that “it makes little or no sense to try to distinguish those things which are ‘inside’ the firm . . . from those things that are ‘outside’ of it. There is . . . only a multitude of complex relationships (i.e., contracts) between the legal fiction (the firm) and [other people],”<sup>184</sup> and that “the personalization of the firm . . . is seriously misleading. The firm is not an individual. It is a legal fiction which serves as a focus for a complex process . . . within a framework of contractual relations.”<sup>185</sup>

What is strikingly missing from these statements is *legal* argumentation.<sup>186</sup> Jensen and Meckling chose to invoke one familiar legal concept—“contract”—while downplaying others, including personhood, merely because they happen to be less physically tangible. In terms of legal theory, going back to Hohfeld’s foundational article,<sup>187</sup> the phrase “nexus of contracts,” as a description of the corporation, is analytically meaningless. If nexus means an *aggregate* of contracts, some persons must be *parties* to each contract;<sup>188</sup> a contract, or any other legal norm, cannot bind itself.<sup>189</sup> If nexus means the *focal point* of many contracts (or a “nexus *for* contracts”<sup>190</sup>), then again, it is persons who are parties to every contract; the

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<sup>183</sup> *Id.* at 311 (emphasis omitted).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* (emphasis omitted).

<sup>186</sup> This is perhaps emblematic of the broader use of “hand-waving metaphors” by those who refuse to fully acknowledge the reality of certain concepts, *see supra* text accompanying notes 132–39.

<sup>187</sup> Hohfeld, *supra* note 46.

<sup>188</sup> *See* Nyquist, *supra* note 155, at 239–40 (“[Hohfeld] argues that a legal relation is always between two persons . . . . [I]f someone has a Hohfeldian right, another person has a duty.”); Stein, *supra* note 155, at 96 (“Hohfeld’s scheme of jural opposites and correlatives unfolded analytical proof that every legal entitlement ultimately transforms into a person’s right, or lack thereof . . .”).

<sup>189</sup> *See supra* notes 146–48 and accompanying text; *see also* Macey & Strine, *supra* note 136, at 466 (“[T]he various constituents to the corporation must, of course, have counter-parties. This counterparty is an entity, namely the corporation itself.”).

<sup>190</sup> KRAAKMAN ET AL., *supra* note 32, at 5.

contract is a second-order legal concept, subservient to a higher degree of freedom—legal persons—who engage in both contractual and many other relationships.<sup>191</sup>

Interestingly, what motivated Jensen and Meckling's 1976 article did not actually require them to describe the corporation as a nexus of contracts, or to deny its legal personhood. As Professor David Gindis recently explained,<sup>192</sup> the article was written in response to the burgeoning corporate social responsibility movement of the 1970s, led by figures such as Ralph Nader.<sup>193</sup> Apparently, Jensen and Meckling believed that by stressing the term "contract," with its connotations of markets and personal choice, they could ward off what they regarded as a serious threat to the American economic order.<sup>194</sup>

Yet, there is no real connection between denying the corporation's personhood and opposing state regulation: while corporate law is not contract law (in many respects, the two are opposites),<sup>195</sup> and the corporation is not a nexus of

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<sup>191</sup> See, e.g., Mariana Pargendler, *Regulatory Partitioning as a Key Function of Corporate Personality*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 50, at 263, 264–66 (“[R]egulatory partitioning . . . is the separation between the legal spheres of the corporation and its members beyond the attribution of property rights over assets. . . . The practical significance of regulatory partitioning calls for the broader conceptualization of the corporation as a ‘nexus for regulation’ beyond the prevailing conception of a ‘nexus of/for contracts.’” (emphasis omitted)); Raz, *supra* note 13, at 1001 (“[T]he corporation [is] a separate legal person—which is not itself a contract, but can *enter into* contracts, as well as myriad other legal relationships, including decidedly non-contractual ones (such as those under tort or environmental law).”).

<sup>192</sup> David Gindis, *On the Origins, Meaning and Influence of Jensen and Meckling's Definition of the Firm*, 72 OXFORD ECON. PAPERS 966 (2020).

<sup>193</sup> See *id.* at 973–76.

<sup>194</sup> See *id.* at 980–81 (“[Jensen and Meckling's] definition makes sense once the socio-political context within which [their 1976 article] was written is taken into account. . . . [W]hen Jensen and Meckling got immersed in the public debate about corporate responsibility and regulation in the late 1970s and early 1980s, their message that private corporations were unlikely to survive additional regulatory burdens followed from their definition of the firm.”).

<sup>195</sup> See Raz, *supra* note 39, at 266–67, 268, 273, 284.

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contracts, corporate law *is* part of private law.<sup>196</sup> There is nothing “regulatory” about the idea of legal personhood, mandatory fiduciary duties, or other structural elements of private law.<sup>197</sup> While private law contains some unwaivable norms, those norms exist to promote individuals’ and entities’ legitimate interests, as people who live and interact with one another,<sup>198</sup> and who might suffer from power and information asymmetries (among other issues), which the law aims to

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<sup>196</sup> See Raz, *supra* note 70.

<sup>197</sup> This observation has also been made in previous articles, from several angles. See *id.* at 988–91, 995–1004; Raz, *supra* note 13, at 990–91; Raz, *supra* note 39, at 265 & n.274, 282–83; Raz, *supra* note 38, at 576 & nn.284–85. Its immediacy cannot be overstated, given the degree to which private law is today being attacked and minimized (for example, with mandatory arbitration, fiduciary duty “waivers,” and many other contexts, see, e.g., *infra* text accompanying notes 266–85), based on not much more than the confusion between public and private law—that is, between the state’s role as a direct party to the legal dispute, and its role as maker and enforcer of laws that alleviate injustice between private parties. In fact, debates within private law (such as those regarding the scope of fiduciary duties, or class actions) lie on a completely different axis than the debate between government intervention and individual choice. For a similar position, see BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* (2019). Those who aim to diminish private law are not promoting any market-oriented or liberal values, but the exact opposite. A system of cronyism, where a few powerful actors manage to absolve themselves from private law frameworks that have worked diligently for centuries, is antithetical to classical liberalism and its core values of freedom and autonomy. Most ironically, those purported “pro-market” jurists, who are working to frustrate the operation of private law, actually place *private* people in situations where their *private law* rights are made to disappear into thin air (as described, for example, in MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013)), solely because of a *public law* debate (involving topics such as textualism, procedural formalism, and regulation) that has seeped into, and now threatens to overrun, the private realm of life.

<sup>198</sup> See, e.g., Goldberg, *supra* note 61, at 1640 (“Private law is law, so government is involved, albeit in a particular way. Typically, it makes available institutions and procedures that enable individuals and entities to define their relationships and to assert and demand the resolution of claims against others.”).

alleviate.<sup>199</sup> In fact, corporate law mandates that the (for-profit) corporation's purpose is the lawful pursuit of profit;<sup>200</sup> and, as Professor Mariana Pargendler recently observed, "regulatory partitioning [(a key function of corporate personality)] has no clear ideological connotation. . . . [R]egulatory partitioning can operate in ways that are . . . pro- or anti-regulation . . . . This, in turn, casts doubt on persistent efforts to derive concrete political or policy implications from the concept of legal personality."<sup>201</sup>

While Jensen and Meckling's work remains highly influential, they did not make the same dramatic contribution—not just to personhood-denial, but to law-denial generally, and in the most high-stakes contexts of the time—as the next two leading protagonists of early law and economics: Judge Frank Easterbrook and Professor Daniel Fischel. In a series of works throughout the 1980s and 1990s (and a few later ones),<sup>202</sup> Easterbrook and Fischel visited topics such as hostile takeovers,<sup>203</sup> the economic distinction

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<sup>199</sup> See, e.g., Robert J. Rhee, *A Liberal Theory of Fiduciary Law*, 25 U. PA. J. BUS. L. 451, 503 (2023) ("In a liberal society and a market system, we should respect autonomy and human agency in dealings. . . . This policy is the animating force of libertarians and contractarians who seek to diminish fiduciary law. Yet . . . [s]ome interests are so important that the law does and should intervene in otherwise private affairs to protect them. . . . Fiduciary law protects these critical interests only when we cannot presume the capacity for equal footing because autonomy and agency have been negated.").

<sup>200</sup> See, e.g., Raz, *supra* note 38, at 533–39; David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181 (2013).

<sup>201</sup> Pargendler, *supra* note 191, at 266.

<sup>202</sup> See, e.g., Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 690 (2009) ("In all of this [(the market environment)] there are no third-party effects. Competition and contracts promote efficiency . . . . Strangers to the finance and governance bargain, such as debt investors and labor, arrange their affairs by their own contracts. . . . [F]ree contracting in a competitive system just has to promote everyone's welfare.").

<sup>203</sup> See Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

between public and private corporations,<sup>204</sup> the (arguably) contractual nature of corporate charters,<sup>205</sup> and the possibility of waiving fiduciary duties.<sup>206</sup> Easterbrook and Fischel's magnum opus, summarizing their various lines of writing in the corporate area, is 1991's *The Economic Structure of Corporate Law*.<sup>207</sup>

In that book, Easterbrook and Fischel organized their argument around a relatively small number of concepts, namely, "competition," "contracts," and "markets."<sup>208</sup> There is nothing inherently wrong with any of these ideas, but Easterbrook and Fischel chose to neglect the degree to which *law* serves as the foundation of all three.<sup>209</sup> Instead, they channeled the spirit of previous authors surveyed in this Section, declaring that "[l]egal identity . . . mean[s] only that the corporation . . . has a name in which it may transact and be sued. . . . It would be silly to attach a list of every one of Exxon's investors to an order for office furniture."<sup>210</sup> They added that "[t]he 'personhood' of a corporation is a matter of convenience rather than reality."<sup>211</sup> Easterbrook and Fischel extended their anti-conceptual approach from corporate law to other settings, as well. For example, they argued that "'Congress' is a collective noun for a group of independent political actors and their employees."<sup>212</sup>

These statements are either illogical or otherwise incorrect. First, in the vein of Morawetz's hand-waving approximations,<sup>213</sup> Easterbrook and Fischel tried to have the

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<sup>204</sup> See Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271 (1986).

<sup>205</sup> See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989).

<sup>206</sup> See Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993).

<sup>207</sup> EASTERBROOK & FISCHEL, *supra* note 21.

<sup>208</sup> *Id. passim*.

<sup>209</sup> See *supra* notes 72–73 and accompanying text.

<sup>210</sup> EASTERBROOK & FISCHEL, *supra* note 21, at 11–12.

<sup>211</sup> *Id.* at 12.

<sup>212</sup> *Id.*

<sup>213</sup> See *supra* text accompanying notes 132–39.

cake and eat it too: they treated the corporation as an aggregate, but at the same time denied that the members of that aggregate have any actual duties arising from its activities (as in the Exxon office furniture example). Under basic law of obligations and Hohfeldian analysis, it is impossible to have a duty without a duty-bearer.<sup>214</sup> Exxon's shareholders are exempt from paying for its purchases not because it would be "silly" to make a list of all shareholders (an empty statement in legal terms),<sup>215</sup> but because they are simply not the people who made those expenditures in the first place. The corporation is. One of the most important and well-recognized features of corporate law—limited liability—would be practically untenable without legal personhood.<sup>216</sup>

Second, although they probably did not think in these philosophical terms, Easterbrook and Fischel joined in the

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<sup>214</sup> See *supra* notes 152–55, 187–91 and accompanying text.

<sup>215</sup> In fact, there *is* some challenge in identifying the shareholders of a public corporation. An ongoing effort by the American Bar Association Business Law Section Task Force on Securities Holding Infrastructure, chaired by Professor Charles Mooney and Sandra Rocks, and involving other scholarly and practice participants, is examining the intermediated holding infrastructure that is dominant in the United States, Europe, and other major financial markets. The Task Force has identified a host of problems arising from intermediated holding, including those related to determining a corporation's beneficial, ultimate shareholders. A draft Task Force report recommends an independent benefit-cost analysis; among other approaches to be considered is a move toward more direct holding on the books of issuers, instead of holding through brokers and banks. See Charles W. Mooney, Jr. & Sandra M. Rocks, Report of American Bar Association Business Law Section Task Force on Securities Holding Infrastructure (July 7, 2023) (unpublished manuscript) (on file with the Columbia Business Law Review). Despite the cost and difficulty in identifying all or some of a corporation's shareholders, that task is not inherently impossible, and hopefully it will be made more feasible once direct holding becomes the norm. In any event, this difficulty or "silliness," claimed by Easterbrook and Fischel, is not why shareholders bear no liability for the corporation's debts, as even single-shareholder corporations (or any other corporation where all shareholders can be easily identified) provide limited liability to their shareholders.

<sup>216</sup> See, e.g., Macey & Strine, *supra* note 136, at 480 ("[L]imited liability is a consequence of the entity theory of the corporation and the law's rejection of the associational theory of the corporation.").



logical positivism of John Dewey and Felix Cohen<sup>217</sup> when they refused to acknowledge not just personhood, but *any* legal concepts that are not immediately visible to the naked eye; their denial of the reality of Congress is a clear example. In fact, both Congress and corporations are real entities, because the law—the Constitution and state common law—says so.<sup>218</sup> Once we move away from the more extreme form of legal realism, it is plain that the law can create both first-order entities, and second-order norms (contracts and other laws) that tell them how to behave.<sup>219</sup> The mere fact that corporations operate *through* humans does not change the reality that those humans are bound by a well-developed legal structure (including, for example, fiduciary duties and equity), which obliges them to act on behalf of the entity, and not on behalf, or in the benefit, of themselves.<sup>220</sup>

Third, Easterbrook and Fischel's argument also ignored then-recent Delaware cases, where the corporation's entity nature was explicitly recognized, such as *Unocal*,<sup>221</sup> *Revlon*,<sup>222</sup> and *Paramount v. Time*<sup>223</sup>—the most important judicial

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<sup>217</sup> See *supra* notes 141, 158 and accompanying text.

<sup>218</sup> For a detailed exploration of this idea in regard to Congress, see Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1 (2018). Specifically, see *id.* at 35 (“The text of the Constitution consistently refers to ‘Congress’ or ‘the Congress’ as the collective lawmaking institution of the federal government acting as a singular entity.” (footnote omitted)).

<sup>219</sup> See *supra* text accompanying notes 146–55.

<sup>220</sup> See, e.g., Miller, *supra* note 74, at 223 & *passim* (discussing the manner in which “fiduciary representation” supports other aspects of corporate personhood).

<sup>221</sup> *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (“[T]he board’s power to act derives from its fundamental duty and obligation to protect *the corporate enterprise . . .*” (emphasis added)).

<sup>222</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985) (explaining that before the company was for sale, “[t]he duty of the board . . . [was] the preservation of Revlon as a corporate entity” and to serve as “defenders of the corporate bastion”).

<sup>223</sup> *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989) (“Delaware law imposes on a board of directors the duty to manage the business and affairs of *the corporation*. This broad mandate includes a conferred authority to set a *corporate* course of action . . . designed to

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moments of the 1980s takeover era.<sup>224</sup> The mistakes of Morawetz, Dewey, Cohen, Jensen, and Meckling almost pale in comparison to those committed by Easterbrook and Fischel at a time when legal personhood took center stage at the world's premier corporate jurisdiction. It is always possible to rhetorically deny the reality of law, just as it is possible to do so in regard to other fields, such as economics or mathematics;<sup>225</sup> neither move is advisable.

For some time, it appeared as if the “nexus of contracts” language won a sound victory.<sup>226</sup> The following Section, however, discusses the more substance-oriented developments in personhood discourse, which began less than a decade after the publication of Easterbrook and Fischel's book, and today are (at least) as salient as the more reductionist conceptions of the previous century.

### C. Personhood in the Twenty-First Century: The Beginnings of Personhood's Scholarly Revival and the Supreme Court Cases

This Section describes the two scenes of academic, judicial, and public discourse where, over the last two decades, the idea of legal personhood has won revived attention.

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enhance *corporate* profitability. . . . [D]irectors, generally, are obliged to chart a course *for a corporation* which is in *its* best interests . . . .” (citation omitted; emphases added)); *Paramount Commc'ns Inc. v. Time Inc.*, C.A. Nos. 10866, 10670, 10935 (Consol.), 1989 Del. Ch. LEXIS 77, at \*83–86 (Del. Ch. July 14, 1989) (“[T]he authorities relied upon do not establish that Time, as a corporate entity, has no distinct legally cognizable interest that the Paramount offer endangers. . . . [W]here the board . . . continues to manage the corporation for long-term profit . . . , the corporation has a legally cognizable interest in achieving that plan.”), *aff'd*, 571 A.2d 1140 (Del. 1989).

<sup>224</sup> See *infra* text accompanying notes 319–40.

<sup>225</sup> See *supra* note 140.

<sup>226</sup> See, e.g., Bratton, *supra* note 23, at 409 (“The new economic theory's core notion describes the firm as a legal fiction that serves as a nexus for a set of contracting relations . . . . This notion has achieved wide currency . . . . Some have accorded this notion the weight of scientific truth . . . .”).

The first of these scenes is legal academia, in which, following Professors Henry Hansmann and Reinier Kraakman's 2000 article,<sup>227</sup> a new generation of law and economics scholars has moved away from the reductionist, contractarian tendencies of its predecessors,<sup>228</sup> and began seriously exploring what legal personhood means in economic and practical terms.

The second scene is the line of Supreme Court cases, epitomized by the *Citizens United*<sup>229</sup> and *Hobby Lobby*<sup>230</sup> decisions, where the Court expanded the scope of constitutional rights enjoyed by corporations—and did so based on a flawed, personhood-lite understanding of the law (which did not prevent the intense, often negative, public response to the concept of personhood following these decisions).<sup>231</sup> On the positive side, this debate also gave rise to a new wave of innovative scholarship on personhood, connecting the corporate law discussion with constitutional law, legal history, and other areas of study.

As this Article explains, these developments have yet to achieve their full potential: the discussion of personhood as a matter of delineating pools of property<sup>232</sup> has valuably moved the ball away from the nexus of contracts era, but it does not fully capture the fact that corporations are not merely holders of property, but also dynamic *actors*, immersed in a wide range of endeavors and debates, including the discussion surrounding corporate constitutional rights, and the general open-endedness mandated under Delaware law, which

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<sup>227</sup> Hansmann & Kraakman, *supra* note 31.

<sup>228</sup> See *supra* Section II.B.

<sup>229</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>230</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

<sup>231</sup> See, e.g., Greenfield, *supra* note 26, at 309–12 (detailing various political and public debates through which “[c]orporate personhood is getting a bad name” in the United States).

<sup>232</sup> See, e.g., Hansmann & Kraakman, *supra* note 31 *passim* (discussing the concept of “asset partitioning” as inherent to legal entities, and explaining that this partitioning could not be accomplished through contract alone).

culminated in the *Twitter* saga.<sup>233</sup> The theory offered in this Article ties together these various strands of scholarship and discourse, and offers a unifying principle that will enable a better, more coherent response as new implications of personhood continue to arise in the future.<sup>234</sup>

Current academic discussion on personhood is centered around a well-developed scholarly scene, which today is at the forefront of law and economics literature.<sup>235</sup> The analysis in this Section focuses on the foundational text of that movement, which captures its most important aspects. In 2000, Professors Henry Hansmann and Reinier Kraakman published their article, *The Essential Role of Organizational Law*.<sup>236</sup> This work, by two leading law and economics experts, was framed as a direct response to the reductionist, law-minimizing contractarianism<sup>237</sup> of Easterbrook, Fischel, and the like. Hansmann and Kraakman began their discussion by drawing a line between “the current literature[, which] increasingly implies [that legal entities] play essentially the same role performed by privately supplied standard-form contracts,”<sup>238</sup> and the possibility that “the various legal entities provided by organizational law permit the creation of relationships that could not practicably be formed by contract alone.”<sup>239</sup>

Hansmann and Kraakman then identified precisely such a function for the legal entity (or legal person):<sup>240</sup> in their view, “the essential role of all forms of organizational law is to

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<sup>233</sup> See *infra* text accompanying notes 251–90; *infra* Part III.

<sup>234</sup> See *infra* Part IV.

<sup>235</sup> See, e.g., sources cited *supra* notes 32–36; Verstein, *supra* note 38. Many of the most important works in this scholarly space appear, or are cited, in Professor Kraakman and co-authors’ *The Anatomy of Corporate Law*, KRAAKMAN ET AL., *supra* note 32.

<sup>236</sup> Hansmann & Kraakman, *supra* note 31.

<sup>237</sup> See *supra* text accompanying notes 178–226.

<sup>238</sup> Hansmann & Kraakman, *supra* note 31, at 390.

<sup>239</sup> *Id.*

<sup>240</sup> On the functional overlap between the terms “entity” and “person,” see *supra* note 38; *infra* note 306. In their article, as well, Hansmann and Kraakman state that “juridical persons” are equivalent to “legal entities.” Hansmann & Kraakman, *supra* note 31, at 393.

provide for the creation of a pattern of creditors' rights—a form of 'asset partitioning'—that could not practicably be established otherwise"<sup>241</sup> (a statement fully congruent with the above discussion of law's preliminary, reality-generating structure).<sup>242</sup> They added that "[t]he truly essential aspect of asset partitioning is . . . the shielding of the assets of the entity from claims of the creditors of the entity's owners or managers,"<sup>243</sup> an aspect which they called "'affirmative' asset partitioning."<sup>244</sup>

The concept of affirmative asset partitioning comes close to aligning with this Article's central idea: personhood as a legal degree of freedom, which makes it impossible for any humans (the entity's shareholders or managers, their creditors, or anyone else) to know in advance whether, how, or when they will benefit from the entity's activities.<sup>245</sup> Yet, even Hansmann and Kraakman's article does not come close *enough*. While it represents one of the most important scholarly leaps away from the reductionist-realist era,<sup>246</sup> it is not clear why Hansmann and Kraakman had to stop at saying that corporate law is "more important as property law than as contract law."<sup>247</sup> As this Article demonstrates, it makes much more sense to recognize that corporate law is neither of the two. With non-human personhood at its center (a concept not found in any other area of private law), corporate law is simply corporate law.<sup>248</sup>

Hansmann and Kraakman's work went one hierarchical step above those of Jensen, Meckling, Easterbrook, and

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<sup>241</sup> Hansmann & Kraakman, *supra* note 31, at 390.

<sup>242</sup> See *supra* text accompanying notes 61–76.

<sup>243</sup> Hansmann & Kraakman, *supra* note 31, at 390.

<sup>244</sup> *Id.* at 393.

<sup>245</sup> See *infra* Part IV.

<sup>246</sup> Another important leap in the direction of taking law seriously, also laying the foundation for a new generation of private law and economics scholarship (this time in the area of property law), was published in the same volume of the *Yale Law Journal*. See Merrill & Smith, *supra* note 69.

<sup>247</sup> Hansmann & Kraakman, *supra* note 31, at 390.

<sup>248</sup> See Raz, *supra* note 39, at 263–64.

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Fischel:<sup>249</sup> while the latter authors focused on the *contracts* made by the corporation, and treated them (incorrectly) as contracts among humans, Hansmann and Kraakman emphasized the difference between the *property* held by the corporation and that held by humans, a difference that can only be sustained through a non-contractual legal framework with a core of mandatory features.<sup>250</sup>

In fact, one *additional* hierarchical step is required: the corporation does even more than hold pools of assets. It also uses those assets, makes contracts, hires employees, serves as a trustee or agent, affects the environment, plays political and religious roles (as *Citizens United* and *Hobby Lobby* exemplify), develops and controls society-changing technologies (*Twitter*), and so on—the list can never be exhausted. The nexus of contracts approach, as a descriptive moniker for the corporation, should be entirely cast aside as counterfactual. In comparison, the idea of asset partitioning does capture a lot of what corporate law and personhood do, but still not *all* of it. Illustrating this, the remainder of this Section discusses personhood’s next big move—and likely its most publicly visible one, at least until *Twitter*—which started in the U.S. Supreme Court, a decade after the publication of Hansmann and Kraakman’s article.

Although *Citizens United*<sup>251</sup> and *Hobby Lobby*<sup>252</sup> were decided four years apart, with majority opinions written by different Justices (Kennedy and Alito), the cases are very similar in their factual background and judicial reasoning. In both cases, a statute enacted by Congress could be interpreted to restrict or expand constitutional rights—freedom of speech and freedom of religion, respectively. In both cases, the persons who claimed to enjoy those rights were corporations—

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<sup>249</sup> See *supra* text accompanying notes 178–226.

<sup>250</sup> See Hansmann & Kraakman, *supra* note 31, at 406 (“In the absence of organizational law, it would be effectively impossible to create the affirmative asset partitioning that is the core characteristic of a legal entity.”).

<sup>251</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>252</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

one, a nonprofit devoted to political campaigning, and the other, a for-profit corporation in the arts and crafts business.

In both cases, however, the Court's analysis focused not on those corporate persons—the actual parties to the case—but instead, on their shareholders and other humans presumably affected by their activities.<sup>253</sup> At least textually (if not in outcome), the Court overlooked precedents such as *Hawes v. Oakland*,<sup>254</sup> and many other cases where the Court fully recognized the separateness of the corporation as a legal person.<sup>255</sup> In *Citizens United*, Justice Kennedy offered that the corporation is “an association that has taken on the corporate form.”<sup>256</sup> In *Hobby Lobby*, Justice Alito stated that “[w]hen rights . . . are extended to corporations, the purpose is to protect the rights of [the] people [associated with the corporation],”<sup>257</sup> that it is a “fiction . . . [to] include[] corporations within [the] definition of ‘persons,’”<sup>258</sup> and that humans “own”<sup>259</sup> corporations.

The Court's assertions in *Citizens United* and *Hobby Lobby* contradict both its own precedents,<sup>260</sup> and ample state law that emphasizes the corporation's nature as an entity, and does so at the most practical, salient junctures of business and social life in recent decades.<sup>261</sup> Intriguingly, at no point did

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<sup>253</sup> See, e.g., WINKLER, *supra* note 27, at 364 (“Corporate personhood . . . is entirely missing from the [*Citizens United*] opinion. . . . [T]he *Citizens United* decision obscured the corporate entity and emphasized the rights of others, like shareholders and listeners.”).

<sup>254</sup> See *supra* text accompanying notes 114–22.

<sup>255</sup> See, e.g., Macey & Strine, *supra* note 136, at 485–95 (surveying “The Supreme Court's Treatment of the Corporate Entity in Other Areas of Law”).

<sup>256</sup> *Citizens United*, 558 U.S. at 349.

<sup>257</sup> *Hobby Lobby*, 573 U.S. at 706–07.

<sup>258</sup> *Id.* at 706.

<sup>259</sup> *Id.* at 707.

<sup>260</sup> See, e.g., Macey & Strine, *supra* note 136, at 485–95.

<sup>261</sup> See *infra* Part III; Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L.J. 811, 812–13 (2018) (“When the Supreme Court gives consideration to the rights of the people who make up the corporation, it lays the framework for a corporate personhood doctrine that relies on the sanctity of constitutional rights for human beings. . . . *Citizens United* and

the Court *have* to use personhood-minimizing language to achieve the outcomes in these cases: constitutional rights can fully be extended to corporations under a real entity theory,<sup>262</sup> in a manner more coherent with the overall legal landscape, compared to the Court resorting to an aggregate theory. According to the internal affairs doctrine,<sup>263</sup> the source of corporate law is state, not federal, law; therefore, much of the reasoning in these two Supreme Court decisions also violates the *Erie*<sup>264</sup> doctrine, which requires federal courts to rely on state law authorities when deciding questions of state law.<sup>265</sup>

An important, but so far understudied, aspect of *Citizens United* and *Hobby Lobby* is how the Court's treatment of personhood in these cases represents part of a much wider problem, which lies at the heart of modern American law: the growing rift between the federal judiciary and the sphere of private law (or, more broadly, common law). This problem, which itself can serve as the subject of a full-length article, manifests in regard to personhood, as well as in the contexts

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*Hobby Lobby* are recent examples of how this dismissal of corporate statutes for the sake of protecting the rights of the people who make up the corporation creates a precedent that can have dangerous and unintended consequences.”).

<sup>262</sup> See Greenfield, *supra* note 26, at 326 (“One can support campaign finance regulation . . . and still acknowledge corporate personhood and corporate constitutional rights as well.”); Raz, *supra* note 38, at 571–72.

<sup>263</sup> See, e.g., Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U. L. REV. 501 (2021) (discussing in detail the internal affairs doctrine and recent developments in its application).

<sup>264</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>265</sup> The main legal questions that were adjudicated in *Citizens United* and *Hobby Lobby* were “federal questions,” in that they involved the interpretation of federal statutes and the Constitution; but even in federal question cases, the *Erie* doctrine requires a federal court to apply state law when faced with a state law question, such as issues of corporate personhood. See, e.g., Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1926 (2011) (“[T]he *Erie* doctrine applies in federal-question and federal constitutional cases, just as it does in diversity cases, provided that an analytically separate question of state law is presented.”).



of equity,<sup>266</sup> mandatory arbitration,<sup>267</sup> and fiduciary law,<sup>268</sup> to name a few.

<sup>266</sup> See, e.g., Andrew Kull, *Equity's Atrophy*, 97 NOTRE DAME L. REV. 1801, 1802–04 (2022) (“What has virtually disappeared [from the federal courts] . . . is equity’s substantive contribution. . . . [T]he most characteristic function of traditional equity was . . . the power to modify and correct applicable *legal* rules, suitable as the first-order resolution of the general run of cases, so as to do better justice between particular parties in particular circumstances. . . . What has been largely forgotten . . . is equity’s residual power of intervention to correct unjust legal outcomes. . . . Current U.S. law sees numerous decisions from which a once-predictable, traditional equitable corrective has simply disappeared.”).

<sup>267</sup> See, e.g., Raz, *supra* note 39, at 234–37 (discussing the Supreme Court’s expansion of the use of mandatory arbitration clauses to block private parties’ access to court, mainly through preemption of state law, based on a supposed textual reading of the Federal Arbitration Act, even when this expansion runs counter to central pillars of contract law, equity, and civil procedure), 254–56 (describing a scenario in which this expansion might reach corporate law), 280 (stating, nonetheless, that “[a] judge (and certainly a textualist judge) is not at liberty to read one part of the [Delaware courts’ description of corporate charters and bylaws]—‘contract’—and skip the discussion of non-contractual, ex post supervision, grounded in equity and in the structure of corporate law”).

<sup>268</sup> See, e.g., *Packer v. Raging Cap. Mgmt., LLC*, 661 F.Supp.3d 3, 14 (E.D.N.Y. 2023) (decision overlooking centuries-long common law of fiduciary duty—which does not require harm, aside from the loyalty breach itself, to support a grant of remedy—while dismissing a derivative action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), by stating that “[p]laintiff fails to point to or articulate any actual reputational harm to [the derivatively-represented corporation] flowing from Defendants’ breach of Section 16(b). Plaintiff’s argument that a violation of Section of 16(b) caused reputational harm, even if said violation went unnoticed by all, cannot support Article III standing”); see also Ann Lipton, *Section 16(b) is Unconstitutional, Apparently*, BUS. L. PROF BLOG (Mar. 31, 2023), [https://lawprofessors.typepad.com/business\\_law/2023/04/section-16b-is-unconstitutional-apparently.html](https://lawprofessors.typepad.com/business_law/2023/04/section-16b-is-unconstitutional-apparently.html) [https://perma.cc/6KDV-38A5] (criticizing the *Packer* decision in a manner consistent with the argument here, by discussing the “blackletter common law that the principal may disgorge any profits associated with [the agent’s personal use of their principal’s property and confidential information],” where “the injury is the principal’s loss of exclusive control over his property. The rule is partially prophylactic in nature; it serves to ensure that the agent acts solely to benefit the principal, and does not abandon or alter his performance for personal gain” (citation omitted)).

The core issue is that, even assuming the federal judiciary is correct in adopting the methods of textualism and procedural formalism when dealing with the Constitution and federal public law statutes,<sup>269</sup> this does not detract from its obligation to adjudicate private and common law<sup>270</sup> matters on their own terms—that is, in a way that pays the closest attention to principles, function, and structure.<sup>271</sup> However, in the wake of legal realism’s emphasis on public law,<sup>272</sup> many federal judges today have largely lost touch with the sensibilities of private law, or even believe that all common law is solely the domain of state courts, or is somehow diametric to what federal courts do.<sup>273</sup>

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<sup>269</sup> See Saiman, *supra* note 28, at 1114 (“Th[e] task [of providing dispositive decisional rules] has shifted to statutory interpretation and legal processes doctrines that govern the state and its lawmaking functions—precisely where American formalist thought has flourished.”).

<sup>270</sup> The term is used here in a context-specific sense, meaning law that is not the Constitution or federal statute (or that *is* these sources, to the extent they utilize or refer to common law concepts). *Cf. supra* note 79.

<sup>271</sup> See *supra* text accompanying notes 61–76.

<sup>272</sup> See, e.g., Goldberg, *supra* note 61, at 1641 (“Legal realism is one important instantiation of a broader view of law that has contributed to the rise of private law skepticism.”). This problem is exacerbated by the present-day tendency to focus on headlines and sweep aside nuances, see, e.g., Chris William Sanchirico, *Win or Lose on Amazon, Philly Needs to Get Smart About Attracting New Businesses*, PHILA. INQUIRER (Oct. 25, 2017), <https://www.inquirer.com/philly/opinion/commentary/amazon-hq2-philadelphia-business-kenney-20171025.html> [on file with the Columbia Business Law Review] (“We[r]e limiting our thinking and attention to blockbuster and celebrity: If it’s not happening in the headlines, it’s not happening.”).

<sup>273</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 7 (Amy Gutmann ed., 1997) (“[F]irst-year law school . . . consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind.”); Judge Paul B. Matey, U.S. Court of Appeals for the Third Circuit, *Advocating Originalism: A Client-Centered Approach to Textualism*, Conversation at the University of Pennsylvania Carey Law School (Oct. 22, 2020) (on file with the Columbia Business Law Review) (arguing that lawyers should be “leaving pleas for equity to cry out in the common law court,” confirming that this refers to state courts, and adding that “state courts, of course, deal with a whole bunch of things that we never get into”).

That belief is unfounded. To begin with, the Constitution itself mentions private and common law concepts, including “equity,”<sup>274</sup> “[c]ontracts,”<sup>275</sup> and “property.”<sup>276</sup> The Constitution does not, however, provide information on what these concepts represent; that task is, and has always been, left to the common law.<sup>277</sup> Nowhere does the Constitution place federal matters outside the universe of the common law, nor does it make any distinction, at this preliminary taxonomic level, between federal and state law. In a sense, the common law has been incorporated into the Constitution, and requires federal courts to apply it according to its own, pre-existing modes of interpretation and general operation.<sup>278</sup>

Put differently, a textualist judge is not required—or, in fact, allowed by the Constitution itself—to apply textualism in regard to the common law. The latter remains a “unit” that the Constitution’s text and original understanding refer to, and *within* that unit, the methodology (both at founding and at present) is not textualist and not procedural-formalist. At its core, what equity meant in 1789 is the same as today: a system of meta-law, requiring *ex post* adjudication and discretion, rooted in more than text alone, to ameliorate opportunism and other causes of unforeseeable injustice.<sup>279</sup> Similarly, legal personhood has existed in the common law since the sixteenth century,<sup>280</sup> and may not be swept aside by federal courts today.

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<sup>274</sup> U.S. CONST. art. III, § 2, cl. 1 (capitalization altered); *id.* amend. XI.

<sup>275</sup> *Id.* art. I, § 10, cl. 1.

<sup>276</sup> *Id.* amends. V, XIV, § 1.

<sup>277</sup> *See supra* note 123.

<sup>278</sup> *See, e.g.,* Balganesch, *supra* note 67, at 2141 (discussing the common law’s “mechanism of evolution and growth”).

<sup>279</sup> *See* Smith, *supra* note 48; *see also* Owen W. Gallogly, *Equity’s Constitutional Source*, 132 YALE L.J. 1213 (2023); Kull, *supra* note 266.

<sup>280</sup> *See* HARRIS, *supra* note 80, at 17–18. For a recent discussion of corporate personhood in the U.S. founding era, see Mark Moller & Lawrence B. Solum, *The Article III “Party” and the Originalist Case Against Corporate Diversity Jurisdiction*, 64 WM. & MARY L. REV. 1345, 1352, 1383 (2023) (“Legal authorities [relevant to the original meaning of the Constitution’s diversity clause] . . . generally classified corporators as nonparties in cases and controversies proceeding in the corporate name. . . . [C]ontroversies

Moreover, contrary to the myth that strictly associates federal law with statute, and state law with the common law, private and common law matters routinely reach the federal courts. They do so in at least four different ways (and in each, the courts have substantial room for improvement): first, diversity jurisdiction;<sup>281</sup> second, federal statutes that contain private law concepts, such as ERISA<sup>282</sup> and the securities

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filed by or against corporations subsist ‘between’ the entity, not its members, and the entity’s opponent . . . .”; “[B]y the eighteenth century, lawyers . . . seemed to have ‘completely assimilated the idea that the corporation is an entity—an artificial individual—rather than a collection of persons . . . .’” (quoting STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 157 (1987)).

<sup>281</sup> See, e.g., *In re Citibank Aug. 11, 2020 Wire Transfers*, 520 F.Supp.3d 390 (S.D.N.Y. 2021) (decision relying on a strict reading of certain New York case law, while minimizing broader common law and equity, to deny relief to a bank that had mistakenly transferred approximately \$900 million to other entities, several of which had refused to return the funds), *vacated and remanded*, *Citibank, N.A. v. Brigade Cap. Mgmt., LP*, 49 F.4th 42 (2d Cir. 2022) (decision reaching the opposite outcome, while mentioning the word “equity” and its inflections 33 times). Although the correct legal answer was ultimately reached, *Revlon, Inc.*—the debtor whose obligations to some lenders were temporarily “satisfied” by the bank’s mistaken payment—entered bankruptcy following the District Court’s ruling and prior to the Court of Appeals’ decision, as it could not negotiate a reorganization with its creditors, due to the uncertainty as to who the creditors are. See *Citibank*, 49 F.4th at 94–95 (Park, J., concurring).

<sup>282</sup> See, e.g., John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1362–65 (2003) (“The Supreme Court’s mishandling of ERISA remedy law has rendered the protections of ERISA illusory in any case in which the victim of ERISA-proscribed wrongdoing needs damages for consequential injury in order to be made whole. . . . [T]he beginnings of the Supreme Court’s trail of error [are] in . . . the premise . . . that ERISA’s remedy provisions are so comprehensive that any feature of remedy law not expressly detailed in the statutory text should be treated as one that Congress deliberately omitted. This confused line of reasoning treats the normal work of applying statutory terms as though it were an effort to import extrastatutory terms. . . . When Congress uses . . . conceptual language, Congress necessarily intends for the courts to interpret it—to supply the specifics. Interpreting is applying, not implying. . . . The dispute is about how to respect the text—to read one word in isolation from the text or to read that word in functional relation to the text. . . . [In cases discussed

laws;<sup>283</sup> third, preemption of state law by federal law;<sup>284</sup> and fourth, the adjudication of private law concepts in otherwise purely federal settings, where the Court's dismissal of personhood in *Citizens United* and *Hobby Lobby* provides a leading, and troubling, example.<sup>285</sup>

The responses to *Citizens United* and *Hobby Lobby*'s personhood aspect fell into two kinds, one negative and the other beneficial. The negative reactions mainly took place in the public arena, where these cases were mistakenly perceived by many people to *endorse* the idea of legal

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in the article, Justice Scalia] found himself attempting to unravel one of the great American achievements of private law, the unification of the law of unjust enrichment.”).

<sup>283</sup> See, e.g., sources cited *supra* note 268; *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 766–70 (2023) (vacating and remanding a decision that denied motion to dismiss a shareholder's lawsuit under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k; doing so based solely on a close linguistic analysis of the words “such security,” and a few other phrases in the federal statute, while entirely overlooking corporate share law—the area of corporate law (and the common law) that gives rise to shares in the first place, determines their nature, and entails, as relevant to this case, that all shares of a given class are fungible, representing the same Hohfeldian claim toward the issuing corporation, so that a corporation is not absolved of liability attaching to a share merely because the share is no longer held by the first person to own it after it was publicly offered, see, e.g., Robert Anderson IV, *A Property Theory of Corporate Law*, 2020 COLUM. BUS. L. REV. 1, 60 (discussing how the legal rights attaching to shares apply equally to “an indefinite and diffuse class of persons”).

<sup>284</sup> See, e.g., *supra* note 267.

<sup>285</sup> Although the minimization of personhood in *Citizens United* and *Hobby Lobby* was not outcome-determinative, see *supra* text accompanying note 262, in subsequent cases it was. See, e.g., *Elfers v. Gonzalez*, No. 1:20-cv-00213-SB, 2020 U.S. Dist. LEXIS 232220, at \*7 (D. Del. Dec. 10, 2020) (decision overlooking corporate personhood while dismissing a derivative action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), by stating that “[the derivative plaintiff]’s story fails because it has only one character. . . . [A] corporation [is] ‘simply a form of organization used by human beings.’ It cannot literally be deceived. If [the derivatively-represented corporation] was deceived, a *person* at [the corporation] must have been. And since the buybacks were approved by [the corporation]’s directors (and apparently nobody else), the *directors* must have been deceived” (citations omitted) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014))).

personhood; due to the charged political and social nature of the cases' outcomes, large swaths of the general public chose to view personhood itself as the culprit, in a debate that reached all the way to the President of the United States.<sup>286</sup> At the same time, a more positive, nuanced response developed in legal academia—positive not in the sense of supporting the Court's assertions, but rather, in reviving the *actual* concept of personhood, and beginning to connect the constitutional discussion with the other spaces (including modern state corporate law and historical common law) surveyed in this Article.

For example, Professor Kent Greenfield, in response to both the Court itself and the public protesters, offered that “[o]ne can support campaign finance regulation . . . and still acknowledge corporate personhood and corporate constitutional rights as well.”<sup>287</sup> Professor Adam Winkler published a well-received book about the distinction between the ahistorical reasoning in the Supreme Court cases and the more accurate portrayal of personhood in state and common law.<sup>288</sup> Professor Elizabeth Pollman has written a long series of articles, acknowledging personhood as a pre-existing, beneficial legal fact, while also criticizing its misinterpretation by the Court.<sup>289</sup> Many additional works of scholarship are cited in these articles and books, or build upon them.<sup>290</sup>

These works, together with the line of law and economics scholarship described earlier in this Section, demonstrate the multi-faceted, constantly changing, and thoroughly unpredictable set of real-world situations and policy debates

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<sup>286</sup> See, e.g., Greenfield, *supra* note 26, at 309–12.

<sup>287</sup> *Id.* at 326. Professor Greenfield offered similar arguments in his book, *KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT)* (2018).

<sup>288</sup> WINKLER, *supra* note 27.

<sup>289</sup> See, e.g., Pollman, *supra* note 37; Pollman, *supra* note 47; see also RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 50 (edited by Elizabeth Pollman and Robert Thompson).

<sup>290</sup> See, e.g., Pollman, *supra* note 37, at 44 n.1 (providing a detailed list of recent works in this area).

generated by legal personhood. Part III continues this line of reasoning, by focusing on the scene where personhood has achieved its most significant impact: Delaware corporate law. This, in turn, leads to Part IV, where the justifications for personhood as a legal degree of freedom are explored in detail, and Part V, where more of personhood's present-day effects are examined.

### III. PERSONHOOD'S TRIUMPH: THE DELAWARE EXAMPLE

Every legal system has a defining story, and for Delaware—the world's leading corporate law jurisdiction<sup>291</sup>—the formative part of that story is the hostile takeover wave of the 1980s.<sup>292</sup> This era shaped both Delaware law, and broader society, in such a fundamental way that even popular culture is replete with period pieces, from *Wall Street*<sup>293</sup> and *Barbarians at the Gate*,<sup>294</sup> through *Die Hard*,<sup>295</sup> to *The Goonies*<sup>296</sup> and *Hook*.<sup>297</sup>

As this Part demonstrates, although scholarly writing has tended to characterize Delaware law primarily as the setting

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<sup>291</sup> See, e.g., William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1404–05 & *passim* (2020) (stating that “corporate law is a matter of state law, and . . . states compete to sell their laws to corporations by supplying corporate charters. Delaware is widely regarded as the winner in this competition” (footnote omitted), and analyzing this competition at the international level as well, where Delaware remains the general benchmark).

<sup>292</sup> See, e.g., William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 263 (1992) (“The 1980s were turbulent years for corporation law. . . . [In 1977,] [n]o one realized . . . that . . . the secure ground upon which the accepted suppositions of corporation law had been premised would [soon] break apart . . .”).

<sup>293</sup> WALL STREET (Am. Ent. Partners & Amercent Films 1987).

<sup>294</sup> BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1989); BARBARIANS AT THE GATE (Rastar Pictures, HBO Pictures & Columbia Pictures Television 1993).

<sup>295</sup> DIE HARD (Gordon Co. & Silver Pictures 1988).

<sup>296</sup> THE GOONIES (Amblin Ent. 1985).

<sup>297</sup> HOOK (Amblin Ent. 1991).

of an ongoing battle between shareholders and managers,<sup>298</sup> Delaware's common law jurisprudence<sup>299</sup>—from (at least) the 1980s to the present—in fact revolves around a more preliminary, central actor: the corporate entity. The most important corporate law landmarks, ranging from *Revlon*<sup>300</sup> and *Paramount v. Time*,<sup>301</sup> to *Credit Lyonnais*,<sup>302</sup> *Americas Mining*,<sup>303</sup> and possibly the highest-profile corporate law case ever<sup>304</sup>—*Twitter*<sup>305</sup>—are all organized, in one way or another, around the implications of the corporation's legal personhood. They, and many other sources, do so with clear, explicit language, consistently employing the words “corporation,” “entity” and “firm,”<sup>306</sup> and eschewing the realist and early law and economics view<sup>307</sup> of the corporation as an aggregate,

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<sup>298</sup> See, e.g., sources cited *supra* note 203.

<sup>299</sup> See KERSHAW, *supra* note 113 (arguing that Delaware corporate law has started from, and continues to develop and rely on, the structure originating in English common law). For a discussion of legal personhood's central place in earlier American and English common law, see *supra* Section II.A.

<sup>300</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985).

<sup>301</sup> *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989); *Paramount Commc'ns Inc. v. Time Inc.*, C.A. Nos. 10866, 10670, 10935 (Consol.), 1989 Del. Ch. LEXIS 77 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

<sup>302</sup> *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, C.A. No. 12150, 1991 Del. Ch. LEXIS 215 (Del. Ch. Dec. 30, 1991).

<sup>303</sup> *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

<sup>304</sup> See Jennings, *supra* note 14, at 78–79 (discussing the broad attention paid to the *Twitter* case by the legal community and the general public).

<sup>305</sup> *Twitter, Inc. v. Musk*, C.A. No. 2022-0613-KSJM, 2022 WL 16963539 (Del. Ch. Nov. 15, 2022). Although the *Twitter* case did not reach a full judicial opinion on the merits, the broader circumstances of the case illustrate the important role of Twitter's status as a legal person. See *supra* note 14.

<sup>306</sup> Although Delaware cases do not frequently use the words “legal person,” that term is functionally equivalent to the phrases that do appear in those cases, including “entity” and “firm.” See Pollman, *supra* note 37, at 45 (using the word “entity-ness” to describe “the essential characteristic of the[] nature [of all corporations]: they are legal persons”); *supra* note 38.

<sup>307</sup> See *supra* Section II.B.



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along with any claim that fiduciary duties (or agency costs) run directly between directors and shareholders (or, for that matter, any other humans).<sup>308</sup>

Even more importantly in a post-realist world, this line of doctrinal development illustrates that there is no conflict between the (previously maligned)<sup>309</sup> legal concept of personhood, and the promotion of economic, social, or other extra-legal objectives.<sup>310</sup> Delaware corporate law treats personhood in a manner consistent with this Article's core idea: by making the corporation into a legal person, the law creates a new degree of freedom—a kind of information firewall.<sup>311</sup> Under this structure, the corporation is, on the one hand, the sole beneficiary of the fiduciary duties owed by its

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<sup>308</sup> See, e.g., *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989) (“[D]irectors, generally, are obliged to chart a course for a corporation which is in its best interests . . . . [A]bsent a limited set of circumstances as defined under *Revlon*, a board of directors . . . is not under any *per se* duty to maximize shareholder value in the short term . . . .”); *N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101–03 (Del. 2007) (“It is well settled that directors owe fiduciary duties to the corporation. . . . Recognizing that directors of an insolvent corporation owe direct fiduciary duties to creditors, would create uncertainty for directors who have a fiduciary duty to exercise their business judgment in the best interest of the insolvent corporation.”); DEL. CT. CH. R. 23.1 (rule of procedure of the Delaware Court of Chancery, amended on September 25, 2023, now titled “Derivative Actions for Entities with Separate Legal Existence,” and clearly recognizing the corporate entity as the sole beneficiary in derivative litigation, by stating, among other things, that “[a] person may serve as a derivative plaintiff if . . . [t]he person can fairly and adequately represent the interests of the entity in pursuing the derivative action,” that “[d]erivative counsel must fairly and adequately represent the interests of the entity in pursuing the derivative action,” and that “‘derivative action’ means an action on behalf of an entity to enforce a claim that the entity could assert”).

<sup>309</sup> See *supra* Section II.B.

<sup>310</sup> See *supra* text accompanying notes 61–76, 173–75.

<sup>311</sup> See *infra* Part IV.

managers,<sup>312</sup> and on the other, itself owes a wide range of duties, to both its stakeholders<sup>313</sup> and shareholders.<sup>314</sup>

Humans reside on both sides of this legal-person firewall, but as the Delaware cases demonstrate, the actual *content* of the duties that will be owed by the corporation, *which* people will actually benefit from them, or *when* this will happen, cannot be determined before the fact. For example, in the takeover context, the corporation enjoys broad latitude to avoid a merger or other transaction that would benefit shareholders in the short term, as happened in the foundational case of *Paramount v. Time*.<sup>315</sup> Equally, the corporation *may* benefit its shareholders in the short term, as *Twitter* illustrates.<sup>316</sup>

In each case, the outcome could have been the opposite, and would be just as consistent with law. To state this in the most practical terms, in each case, both outcomes would comply with the business judgment rule. Personhood is at the center of a legal framework—corporate law—which permits the entity to embark on an open-ended range of endeavors, while owning its own assets, making its own contracts, and more generally and importantly, engaging in whatever lawful activities it pleases.<sup>317</sup> This structure promotes

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<sup>312</sup> See *supra* note 308.

<sup>313</sup> See, e.g., Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2027 (2019) (“[F]idelity to the law is nonnegotiable and is a requirement that aims to protect a public realm to which corporate law must subscribe . . .”). The law mentioned in Professor Pollman’s statement is non-corporate law, which is the source of stakeholders’ legal claims against the corporation.

<sup>314</sup> See, e.g., Asaf Raz, *Share Law: Toward a New Understanding of Corporate Law*, 40 U. PA. J. INT’L L. 255, 292 (2018) (“[T]he . . . claim held by shareholders is toward the corporation . . ., not [toward] its directors . . .”).

<sup>315</sup> *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989) (“[A]bsent a limited set of circumstances as defined under *Revlon*, a board of directors . . . is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover.”).

<sup>316</sup> See *infra* text accompanying notes 351–69.

<sup>317</sup> See, e.g., Strine, *supra* note 52, at 1275 (“The Delaware Model . . . provides corporate managers with the flexibility to do practically any lawful act . . .”).

entrepreneurship, legitimate risk-taking, and other economic, social, and technological benefits, in a manner that could not be achieved without legal personhood.<sup>318</sup> Part IV below justifies this structure from a theoretical and economic perspective, while this Part describes how it operates in practice, at the world's central jurisdiction for corporate law.

It makes sense to begin with two of the cases that former Chief Justice of Delaware, Leo Strine, listed as the “big three”<sup>319</sup> corporate law decisions of the mid-1980s. In the *Revlon*<sup>320</sup> case, renowned cosmetics maker Revlon, Inc. became the target of a takeover by Ron Perelman-controlled Pantry Pride, Inc. As the Delaware Supreme Court held a few months earlier in the case of *Unocal*,<sup>321</sup> although the corporate entity itself is not party to a takeover (which is, essentially, a transfer of shares between shareholders), it does have the power, through its board of directors, to block a takeover attempt that is “harmful to the corporate enterprise.”<sup>322</sup>

In *Revlon*, Delaware's high court reached a contrary outcome to that in *Unocal*, but it did so based on the exact same premises: that the fiduciary duty is owed *to the corporation*, and only as an exception (in this case, because the corporation being taken over by *someone* became inevitable), directors might owe a temporary, ad hoc duty to shareholders. The court provided this reasoning:

The Revlon board[] . . . recogni[zed] that the company was for sale. The duty of the board had thus *changed*

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<sup>318</sup> See Raz, *supra* note 39, at 267–77.

<sup>319</sup> Leo E. Strine, Jr., *The Story of Blasius Industries v. Atlas Corp.: Keeping the Electoral Path to Takeovers Clear*, in CORPORATE LAW STORIES 243, 243 (J. Mark Ramseyer ed., 2009) (“When students take Corporate Law and are instructed in the key takeover decisions of the 1980s and the mid-1990s, the arc of the story often runs from the ‘big three’ (*Unocal*, *Moran* and *Revlon*) through *Time-Warner* to *QVC* and *Unitrin*.” (footnotes omitted)).

<sup>320</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985).

<sup>321</sup> *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

<sup>322</sup> *Id.* at 949.

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from the preservation of *Revlon as a corporate entity* to the maximization of the company's value at a sale for the stockholders' benefit. . . . [The board] no longer faced threats to *corporate* policy and effectiveness . . . . The directors' role changed from *defenders of the corporate bastion* to auctioneers charged with getting the best price for the stockholders at a sale of the company.<sup>323</sup>

This exception—which became known as *Revlon* mode— involves a specific situation where the corporation itself simply does not stand to win or lose anything from directors' present actions; only the economic value of shareholders' holdings is at stake. This is a relatively rare setting, as most corporations, in Delaware and globally, are a going concern, and not on the verge of a break-up.<sup>324</sup>

In subsequent cases, the Delaware courts placed even clearer emphasis on the corporate entity. Contrary to those who believe that the conflict of corporate law is merely between managers and shareholders,<sup>325</sup> the landmark decisions surveyed below indicate that neither of these two groups necessarily “wins” in any given case: fiduciaries owe substantial, enforceable duties to the entity, and must undertake all of their actions (to the extent they involve the corporation) to this sole end. Shareholders may, or may not, see any tangible monetary benefit from the entity, which can choose whether to cause a transfer of wealth to its shareholders (in the form of a dividend, buyback, merger,

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<sup>323</sup> *Revlon*, 506 A.2d at 182 (emphases added).

<sup>324</sup> See, e.g., Raz, *supra* note 38, at 560 (“[M]ost corporations, most of the time, are a ‘going concern,’ not in *Revlon* mode, and not at the end of their lives.”). Even outside of *Revlon* mode, there are a few situations—such as interference with shareholders' voting rights, see *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988)—where fiduciary duties might run directly to shareholders. These exceptions do not impinge on the centrality of the corporate entity, because they only represent instances where the entity is not being (or should not be) affected by a given fiduciary action. They exist separately from, and do not permit the violation of, any duties that *are* owed to the entity, in the usual course of corporate existence.

<sup>325</sup> See, e.g., sources cited *supra* note 203.

buyout, or liquidation), at any point in time, on an entirely contingent, ex post basis.<sup>326</sup>

In the well-known 1989 case of *Paramount v. Time*,<sup>327</sup> a three-sided takeover battle emerged between Time Inc. (the central target entity), Paramount Communications, Inc. (the hostile takeover bidder), and Warner Communications, Inc. (a friendly merger partner, with which Time had been negotiating a transaction for several years prior to Paramount's arrival on the scene).<sup>328</sup> Time strongly resisted Paramount's overtures, primarily because of Time directors' stated concern for "the preservation of the 'Time Culture,'"<sup>329</sup> which was linked to its "editorial integrity and journalistic focus."<sup>330</sup> The looming deal with Warner included negotiated protections for Time's existing business plan and culture,<sup>331</sup> whereas Paramount, the competing bidder, made no such promises.

After it became clear to Paramount that its present merger proposal to Time would not make the latter cooperate on a friendly deal, it initiated a takeover bid addressed directly to Time's shareholders; that bid, at \$200 per share, was far more than what Time shareholders would receive in the Warner transaction, and even higher than the current market price of Time shares.<sup>332</sup> When Time refused to remove its anti-takeover protections even at that price, Paramount (along with several other dissatisfied shareholders) filed suit in the Delaware Court of Chancery, asking to enjoin the Warner deal; this group of plaintiffs claimed that the deal was

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<sup>326</sup> See, e.g., WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 143 (5th ed. 2016) ("[Shareholders] have no right to any periodic payment, nor can they demand the return of their investment from the corporation."); *infra* note 367.

<sup>327</sup> *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

<sup>328</sup> See *id.* at 1141–49.

<sup>329</sup> *Id.* at 1143 n.4.

<sup>330</sup> *Id.* at 1143.

<sup>331</sup> See *id.* at 1146.

<sup>332</sup> See *id.* at 1148–49.

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contrary to shareholder interests, and incompatible with both *Unocal* and *Revlon*.<sup>333</sup>

Tellingly, despite the case's tight schedule (the Chancery opinion was handed down on July 14, 1989, and the Supreme Court provided its decision from the bench on July 24),<sup>334</sup> both of the nation's leading business courts easily and intuitively organized their written opinions around the corporation's nature as an entity, having its own interests, and owed its own fiduciary duties. As Chancellor William Allen first said,

[i]n my opinion, the authorities relied upon do not establish that Time, as a corporate entity, has no distinct legally cognizable interest that the Paramount offer endangers. . . . [W]here the board has not elected explicitly or implicitly to assume the special burdens recognized by *Revlon*, but continues to manage the corporation for long-term profit pursuant to a preexisting business plan that itself is not primarily a control device or scheme, the corporation has a legally cognizable interest in achieving that plan.<sup>335</sup>

When affirming Chancellor Allen's decision, the Delaware Supreme Court similarly offered that

Delaware law imposes on a board of directors the duty to manage the business and affairs of the corporation. This broad mandate includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability. . . . [D]irectors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon. . . . [A]bsent a limited set of circumstances as defined under *Revlon*, a board of directors, while always required to act in an informed manner, is not under any *per se* duty to

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<sup>333</sup> See *id.* at 1149–50.

<sup>334</sup> See *id.* at 1141.

<sup>335</sup> *Paramount Commc'ns Inc. v. Time Inc.*, C.A. Nos. 10866, 10670, 10935 (Consol.), 1989 Del. Ch. LEXIS 77, at \*83–86 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

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maximize shareholder value in the short term, even in the context of a takeover.<sup>336</sup>

More than a milestone in the development of Delaware doctrine in the cardinal area of takeovers, *Paramount v. Time* is, first and foremost, a case about legal personhood. At that, it does far better job than *Citizens United* and *Hobby Lobby*.<sup>337</sup> When establishing what shareholders may or may not expect from their corporation in a high-intensity M&A environment, both levels of the Delaware judiciary framed their analysis around the primacy of the corporation as an entity. These courts *could* have hewed to the aggregate, nexus-of-contracts fashions of the day<sup>338</sup>—presenting the case simply as a dispute between directors and shareholders over a common pool of assets—but they did not.

As Part IV below also explains, this is far from what John Dewey or Felix Cohen would have viewed as word-trickery: the entity-focused analysis that the Chancellor and the Justices pursued was, first, entirely compatible with common law jurisprudence dating back to at least the nineteenth century;<sup>339</sup> and, as importantly, it promoted a critical economic goal—the protection of legal persons as “lasting institutions,”<sup>340</sup> which can pursue their long-term plans without owing any distribution of capital, or any disruption of the corporation itself, to benefit shareholders over any specific time frame.

After *Paramount v. Time* put the finishing legal touch on the 1980s takeover era, Delaware law continued to rely on the same principled understanding of legal personhood as an immutable fact. The decisions discussed below—where the corporation’s nature as an entity led to various, and sometimes profoundly unexpected, outcomes—demonstrate the multi-faceted nature of personhood as a legal degree of freedom. Personhood creates an unmatched level of decisional

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<sup>336</sup> *Paramount v. Time*, 571 A.2d at 1150 (citation omitted).

<sup>337</sup> See *supra* text accompanying notes 251–90.

<sup>338</sup> See *supra* text accompanying notes 178–226.

<sup>339</sup> See *supra* Section II.A.

<sup>340</sup> Blair, *supra* note 34, at 454.

freedom *within a given situation* (such as the takeover context), but even more fundamentally, personhood constantly generates *new*, unpredictable situations.

Thus, in the 1991 case of *Credit Lyonnais*,<sup>341</sup> Chancellor Allen was again required to grapple with a situation where a corporation's directors were asked to decide whether to favor the short-term interests of shareholders—this time not in the context of a takeover, but rather, because the corporation was on the verge of insolvency. Although the parties framed the argument in aggregate-like terms, demanding the directors benefit one group (shareholders or stakeholders) over the other, Chancellor Allen responded with this analysis:

[The optimal] result will not be reached by a director who thinks he owes duties directly to shareholders only. It will be reached by directors who are capable of conceiving of the corporation as a legal and economic entity. . . . [C]ircumstances may arise when the right (both the efficient and the fair) course to follow for the corporation may diverge from the choice that the stockholders (or the creditors, or the employees, or any single group interested in the corporation) would make if given the opportunity to act.<sup>342</sup>

Even in the wake of these clear judicial statements, some scholars were still trying to discuss corporate law as if it were about a direct struggle between fiduciaries and shareholders, with Delaware leaning toward the former.<sup>343</sup> Was the “corporate entity” simply a façade meant to allow directors greater leeway in defending their business decisions (and board seats)? 2012's *Americas Mining*<sup>344</sup> decision proves the opposite. In fact, the question presented in this case, and

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<sup>341</sup> *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, C.A. No. 12150, 1991 Del. Ch. LEXIS 215 (Del. Ch. Dec. 30, 1991).

<sup>342</sup> *Id.* at \*108 n.55. For further analysis of the *Credit Lyonnais* decision and its relation to later Delaware case law on the corporate entity in the vicinity of insolvency, see, for example, Raz, *supra* note 13, at 975–77; Raz, *supra* note 38, at 537 & n.70.

<sup>343</sup> See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2002).

<sup>344</sup> *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).



decided *solely* on the basis of the corporation's nature as an entity, had nothing to do with a takeover battle, or any of the "headline" questions Delaware law had previously grappled with. More importantly, in this case, the corporation's personhood operated *to benefit shareholders*, and contrary to fiduciaries' interests. This, once again, captures the effects of personhood as a legal degree of freedom.

In *Americas Mining*, a shareholder-plaintiff asserted, and won, fiduciary law derivative claims<sup>345</sup> on behalf of a corporation, 81% of whose outstanding shares were owned by a single controlling company (which, in turn, was one of the defendants).<sup>346</sup> After the case was decided on the merits, the question arose how to calculate the court-ordered fees which should be paid to plaintiff's counsel, for their successful handling of the lawsuit. This was a consequential issue: the total recovery in the case was slightly more than \$2 billion, so at the usual fee rate of 15%, the compensation awarded to the lawyers, by the Court of Chancery, was \$304 million.<sup>347</sup> However, if—as the defendants asserted on appeal—the corporation should be treated as an aggregate of its shareholders, only 19% (100% less 81%) of this amount, or about \$58 million, should be paid to plaintiff's counsel, because the controlling shareholder gained nothing from the lawsuit (filed against the controlling shareholder itself).<sup>348</sup> The amount at stake, therefore, was approximately a quarter-billion dollars.

Unsurprisingly, the Delaware Supreme Court rejected the defendants' argument, upheld its own precedent emphasizing the corporation's entity nature in the derivative litigation context,<sup>349</sup> and affirmed the Court of Chancery's \$304 million

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<sup>345</sup> On the meaning and purpose of derivative actions in corporate law, see *supra* text accompanying notes 100–13.

<sup>346</sup> See *Americas Mining*, 51 A.3d at 1263.

<sup>347</sup> See *id.* at 1218, 1252.

<sup>348</sup> See *id.* at 1263.

<sup>349</sup> See *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033–39 (Del. 2004) ("Th[e] issue [of whether a stockholder's claim is derivative or direct] must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders,

fee award. To do so, the state's high court relied on the same unyielding view of personhood as an immutable, *ex ante* component of the law:

The derivative suit . . . enables a stockholder to bring suit on behalf of the corporation for harm done to the corporation. Because a derivative suit is being brought on behalf of the corporation, any recovery must go to the corporation. . . . [A stockholder's] individual injury is distinct from an injury to the corporation alone. . . . In this case, the corporation was harmed and the total recovery is awarded to the corporation . . .—not “nominally” but actually. . . . No stockholder, including the majority stockholder, has a claim to any particular assets of the corporation. Accordingly, Delaware law does not analyze the “benefit achieved” for the corporation in a derivative action . . . as if it were a class action recovery for minority stockholders only.<sup>350</sup>

This, finally, brings us to *Twitter*.<sup>351</sup> Somewhat ironically, Delaware's highest-profile case in history<sup>352</sup> ended without trial,<sup>353</sup> and without any full judicial opinion on the merits.<sup>354</sup> Yet, the overall factual setting of the case, which was covered in depth by both the general media and legal scholars,<sup>355</sup>

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individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)? . . . In this case it cannot be concluded that the complaint alleges a derivative claim. There is no derivative claim asserting injury to the corporate entity. There is no relief that would go [to] the corporation.”).

<sup>350</sup> *Americas Mining*, 51 A.3d at 1264–65 (footnotes omitted; formatting altered).

<sup>351</sup> *Twitter, Inc. v. Musk*, C.A. No. 2022-0613-KSJM, 2022 WL 16963539 (Del. Ch. Nov. 15, 2022).

<sup>352</sup> See *supra* note 14 and accompanying text.

<sup>353</sup> See *Jennings*, *supra* note 14 *passim*.

<sup>354</sup> See *Twitter*, 2022 WL 16963539, at \*1 (decision consisting of a single word: “Granted”). The granted action is the parties' joint stipulation for voluntary dismissal of the case, *see id.*, following the defendants' consent to move forward with the merger.

<sup>355</sup> See, e.g., Robert Anderson, *Limited Specific Performance in the Musk-Twitter Case and Beyond* (Working Paper) (Oct. 4, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4222557](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222557)

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provides an excellent case study on the role of legal personhood in shaping both directors' fiduciary duties, and shareholders' rights, during the most crucial moments of a corporation's existence.

In terms of the actors and interests involved, *Twitter* began as a near-perfect copy of the 1980s trio of *Unocal*, *Revlon*, and *Paramount v. Time*.<sup>356</sup> Once again, a group of acquisition entities appeared on the scene with a high-premium takeover bid addressed to the target corporation's shareholders; and once again, initially, the target corporation resisted this bid, by deploying a battery of defensive measures, including a poison pill.<sup>357</sup>

In late April 2022, however, Twitter changed its mind, and decided to sign a merger agreement with the offerors, whereby all of Twitter's shares would be purchased for the total amount of about \$44 billion, or \$54.20 for every publicly-held share, well above the shares' market price at the time.<sup>358</sup> A few weeks later, the bidders themselves changed their mind, and decided to back away from the agreement.<sup>359</sup> In response, Twitter filed suit in the Delaware Court of Chancery—a case that remained pending for four months, generated a plethora of procedural decisions, and was sealed with a one-word order, “Granted,”<sup>360</sup> after the parties managed to revive their initial agreement.

Under well-established corporate law principles, including the business judgment rule,<sup>361</sup> there can be no doubt that Twitter, through its directors, was fully within its rights—that is, within its private, volitional, extra-legal

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[<https://perma.cc/8H8V-S3LT>]; Jennings, *supra* note 14; Lipton, *supra* note 51.

<sup>356</sup> See *supra* notes 319–40 and accompanying text.

<sup>357</sup> See *supra* notes 2–3.

<sup>358</sup> See *supra* note 4.

<sup>359</sup> See *supra* note 5.

<sup>360</sup> *Twitter, Inc. v. Musk*, C.A. No. 2022-0613-KSJM, 2022 WL 16963539, at \*1 (Del. Ch. Nov. 15, 2022).

<sup>361</sup> See, e.g., Strine, *supra* note 52, at 1275 (“The Delaware Model . . . provides corporate managers with the flexibility to do practically any lawful act, subject to judicial review focused on whether the managers were properly motivated and not irrational.”).

discretion<sup>362</sup>—to pursue the merger agreement to completion (as it did). The problem with the argument made by leading, thoughtful scholars during the pendency of this short-lived case was the assumption that Twitter, or its directors, were somehow *legally obliged* to do so.<sup>363</sup> In reality, both the 1980s cases (*Unocal*, *Revlon*, *Paramount v. Time*, and their kin), and a vast array of other Delaware authorities, including those surveyed in this Part, all clearly indicate that this is not the case. Twitter, as an entity, could *choose* how to lawfully shape its own future, without asking permission from anyone else for the specific choice it made. It had no legal duty to its shareholders—whether long-term, short-term, arbitrageurs (“arbs”), or any other kind of investors—to complete the merger.

In fact, Delaware law does not, and never did, embrace an approach of “shareholder primacy,” neither in words, nor in outcomes. The real primacy belongs to the structure of corporate law, with the corporate entity at its center—an entity involved in a range of open-ended endeavors (and relatedly, among other things, bound by legal obligations to more than its shareholders).<sup>364</sup> Both in the takeover or M&A context, and in the going concern setting, the corporate entity enjoys extremely broad latitude to continue pursuing its “preexisting business plan.”<sup>365</sup> Equally, it can change or diverge from that plan. As *Paramount v. Time* said, “absent a limited set of circumstances as defined under *Revlon*, a board of directors . . . is not under any *per se* duty to maximize

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<sup>362</sup> See Raz, *supra* note 70, at 991–93 (discussing the distinction between the “private sphere,” where “private law . . . empowers people to write their own life stories,” and the “public sphere,” where “public law . . . impos[es] and enforc[es] norms as to what people . . . can or cannot do” (citing Dagan & Zipursky, *supra* note 19)).

<sup>363</sup> See, e.g., Lipton, *supra* note 51.

<sup>364</sup> See Raz, *supra* note 13, at 1001.

<sup>365</sup> *Paramount Commc’ns Inc. v. Time Inc.*, C.A. Nos. 10866, 10670, 10935 (Consol.), 1989 Del. Ch. LEXIS 77, at \*86 (Del. Ch. July 14, 1989), *aff’d*, 571 A.2d 1140 (Del. 1989).

shareholder value in the short term, even in the context of a takeover.”<sup>366</sup>

Yet, the lack of a *duty* to act a certain way does not preclude the *possibility* of acting that way—in this case, maximizing shareholder value in the short term. *Twitter* is *Paramount v. Time*’s mirror image, and both revolve around the open-endedness to which the corporation’s nature as a legal person fundamentally contributes. Scholars and others who decry the outcome in *Twitter* are not criticizing anything that stemmed from a (non-existent) law of shareholder primacy.<sup>367</sup> Rather, they are dismayed by the manner, in one

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<sup>366</sup> *Paramount v. Time*, 571 A.2d at 1150.

<sup>367</sup> While there is no law of shareholder primacy, there *is* the law of corporate purpose, which mandates, among other things, that the for-profit corporation’s purpose is the *lawful* pursuit of *its* own profit as an entity. *See, e.g., Raz, supra* note 13, at 951 & n.107; sources cited *supra* note 200. The law of corporate purpose, together with the rest of corporate law, vests the entity with an extremely broad latitude of choice as to how to achieve its purpose. At any point in time, that range of action is not necessarily linked to promoting shareholders’ wealth (in the form of a dividend, buyback, merger, buyout, or liquidation; these are distinct from the equitable, non-directly-monetizable claim that a share *always* represents). Neither the outcome in *Paramount v. Time*, nor the opposite outcome in *Twitter*, were dictated by the law of corporate purpose. Both of these outcomes, and many others, were merely *possible* under that law. For a well-known Delaware case discussing the nature of shareholders’ claims as ultimate and derivative of the corporation itself and its changing fortunes, see *In re Trados Incorporated Shareholder Litigation*, 73 A.3d 17, 36–41 (Del. Ch. 2013) (“[The ‘duties to the corporation and its shareholders’] formulation captures the foundational relationship in which directors owe duties *to the corporation* for the *ultimate* benefit of the entity’s residual claimants. . . . [T]he duty of loyalty . . . mandates that directors maximize the value *of the corporation* over the long-term for the benefit of the providers of equity capital, as warranted for *an entity with perpetual life* in which the residual claimants have *locked in* their investment. . . . The duty to act for the *ultimate* benefit of stockholders does not require that directors fulfill the wishes of a particular subset of the stockholder base. . . . To reiterate, the standard of conduct for directors requires that they strive in good faith and on an informed basis to maximize the value *of the corporation* for the benefit of its residual claimants, the *ultimate* beneficiaries of *the firm’s* value . . . .” (emphases added)). The new analysis provided in this Article, of personhood as a legal degree of freedom, animates and explains the term “ultimate” in this context, while clarifying the fundamental difference between the

specific case, that a more preliminary fact—which extends beyond corporate law itself, and into the very idea of being a person in society<sup>368</sup>—has played out: the fact that people can make their own lawful choices, whether or not others approve of them.<sup>369</sup> Part IV explains why this degree of freedom is socially and economically beneficial, and could not be achieved without legal personhood.

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equitable claim—the share itself—that shareholders always possess (a claim which deserves continued protection by the legal system, *see Raz, supra* note 13, at 951–53, 991), and the contingent possibility of shareholders receiving any monetary or other benefit, which lies on a separate analytical level than the share and the corporate entity that issued it.

<sup>368</sup> *See, e.g.,* Hanoch Dagan, *Autonomy and Pluralism in Private Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW, *supra* note 62, at 177, 177 (“[P]rivate law enables us meaningfully to act and interact in the world; to make plans and pursue goals; to self-determine. . . . [P]rivate law is guided by an autonomy-enhancing *telos*. Private law, at its core, facilitates people’s self-determination and forms the foundation of a social life premised on the maxim of reciprocal respect for self-determination.”).

<sup>369</sup> In addition to Professor Dagan’s work, *see, e.g., id.*, this fundamental idea is reflected in many legal concepts and lines of literature, such as the principle of legality, *see, e.g.,* John Laws, *Beyond Rights*, 23 OXFORD J. LEGAL STUD. 265, 274–75 (2003) (“[F]or the citizen, everything that is not forbidden is allowed, for the State or the government, everything that is not allowed is forbidden. . . . [L]aw is the medium through which the relation between government and citizen . . . [is] necessarily expressed, and this is in contrast with the mediums of personal morality, which are all the unruly modes of individual relationships.”), the concept of subsidiarity, *see, e.g.,* Malcolm Lavoie, *Subsidiarity and the Structure of Property Law*, 74 U. TORONTO L.J. (forthcoming 2024) (manuscript at 2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4430459](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430459) [<https://perma.cc/ZFG3-2Q2D>] (“Subsidiarity is a modern concept with an ancient lineage. The basic idea is that larger, more centralized organizations should fulfill a subsidiary function in relation to the individuals and smaller groups of which they are comprised.”), and Lon Fuller’s distinction between “the morality of aspiration” and “the morality of duty,” LON L. FULLER, *THE MORALITY OF LAW* *passim* (rev. ed. 1969).

#### IV. JUSTIFYING PERSONHOOD AS A LEGAL DEGREE OF FREEDOM

So, why personhood? The previous Parts have demonstrated, first, that although the idea of legal personhood has had a rocky journey throughout the last hundred years or so, today's academic and public discourse is in the process of rediscovering personhood as a workable concept, no less (and often more) useful than contract, property, or other well-accepted subjects of legal and economic literature.<sup>370</sup> The discussion above has also shown that in Delaware—the world's most important jurisdiction for corporate law—the corporation's nature as a legal person has played a more profound role than previously recognized, at some of the most important economic and social junctures in recent history, from the takeover battles of the 1980s to the closely-watched *Twitter* saga.<sup>371</sup> This Part ties the various strands together, by offering a new theoretical justification for personhood as a *legal degree of freedom*,<sup>372</sup> which generates

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<sup>370</sup> See *supra* Part II.

<sup>371</sup> See *supra* Part III.

<sup>372</sup> The term “degree of freedom” is commonly used in physics, where it denotes “[t]he least number of mutually independent parameters (coordinates) required to uniquely define a material system's position in space, time, etc.” Eric W. Weisstein, *Degree of Freedom*, WOLFRAM, <https://scienceworld.wolfram.com/physics/DegreeofFreedom.html> [<https://perma.cc/GT49-D4Q4>]. For example, although all protons in the universe have the exact same rest mass and electric charge, protons are composed of smaller particles (degrees of freedom)—quarks and gluons—whose quantity, internal location, and individual kinetic energy differ from one proton to another. This fact becomes important, for instance, in particle accelerators such as the Large Hadron Collider, where each proton collision can yield different particles (including, rarely, the Higgs boson), depending on the specific interaction of the protons' constituent degrees of freedom. See, e.g., M. L. Mangano, *QCD and the Physics of Hadronic Collisions*, in PROCEEDINGS OF THE 2017 CERN–LATIN-AMERICAN SCHOOL OF HIGH-ENERGY PHYSICS 27, 28 (M. Mulders & G. Zanderighi eds., 2018) (“All processes in hadronic collisions . . . are in fact induced by the quarks and gluons contained inside the hadron.”). Applying this idea to law (as this Part does in detail), a contract, trust, or any other relationship or trait is like the composite particles, whereas the person creating, modifying, or otherwise affecting those phenomena is the underlying degree of freedom. While a

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practical benefits that could not be achieved under any other legal framework.

Consider a world without artificial legal personhood. In this world, only humans would be persons. Accordingly,<sup>373</sup> those humans would be able to enter numerous legal relationships: they would create various legal rights and duties toward one another,<sup>374</sup> such as contracts, property rights, trust and agency relationships, public law liabilities, and so forth. Some of those relationships, such as contract, people can *choose* whether to engage in.<sup>375</sup> Others, such as those under tort, environmental, or criminal law, all people in society are subject to, in one way or another. While some of the relationships mainly confer *duties* upon certain people, others (such as contract and property) confer *power* to operate in the world in a personally-chosen, non-pre-defined manner.<sup>376</sup>

In all this, however, the rights, duties, and relationships themselves *are* known and defined in advance. So are the people who hold each right and duty. Every person can be viewed as a preliminary degree of freedom, an unmoved mover who does not, and is not meant to, know in advance *which* contracts (for example) they will make; but once a contract *is* made, it locks the parties to its specific set of *ex ante*

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contract is itself a secondary degree of freedom—an important one, which law and economics literature has, so far, tended to focus on—the question of whether, which, when, and in what way contracts will exist is determined by persons.

<sup>373</sup> See *supra* notes 152–55 and accompanying text (discussing the fact that only persons can bear rights and duties).

<sup>374</sup> See Parchomovsky & Stein, *supra* note 46, at 1320 (“Our legal system is organized around the concepts of rights and duties.”).

<sup>375</sup> See, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

<sup>376</sup> See, e.g., Dagan, *supra* note 368, at 177–78 (“[M]any of [private law’s] rules—and, importantly, the two private law building blocks of property and contract—are essentially power-conferring. The normative powers instantiated by property law and by contract law allow people to have private authority over resources . . .”).



promises.<sup>377</sup> The same applies even when there is more of an ex post dimension to the relationship: if one serves as a trustee for another human, the latter person—the beneficiary—is entitled to the fiduciary loyalty of the trustee, who, by definition, cannot ever be legally permitted to operate against the beneficiary’s benefit.<sup>378</sup> Moreover, all known types of legal relationships (except those that do provide the additional layer of personhood and open-endedness, as discussed below) add other kinds of pre-defined anchors and limitations: for example, in trust law, there is always specific “trust property”;<sup>379</sup> and in agency law, the agent must operate “subject to the principal’s control.”<sup>380</sup>

Yet, in many cases, it might actually be more beneficial—economically, socially, interpersonally, technologically, or otherwise—to *not* know in advance what duties will be owed to whom, and in regard to what assets or other subject matters. At some point, it makes sense to have a legal institution which, on the one hand, can own property and have other rights (the content of which, itself, cannot be ascertained in advance), and on the other hand, can constantly choose and re-choose *what to do* with those resources: *which* contracts to make, *what* kind of technology to develop, *which* areas of law to become subject to,<sup>381</sup> and so on.

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<sup>377</sup> See, e.g., *ASB Allegiance Real Est. Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440 (Del. Ch. 2012) (“[A contract law] claim . . . looks to the past. . . . [It asks] what the parties would have agreed to . . . at the time of contracting.”).

<sup>378</sup> See, e.g., Adam Hofri-Winogradow, *The Irreducible Cores of Trustee Obligations*, 139 L.Q. REV. 311 (2023) (discussing in detail the trustee’s mandatory duty to operate in the benefit of the beneficiaries); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1107–11 (2004) (discussing the immutable rule that a trust must “[b]enefit the [b]eneficiaries”).

<sup>379</sup> RESTATEMENT (THIRD) OF TRUSTS §§ 2 cmt. i (AM. L. INST. 2003) (“A trust cannot be created unless there is trust property in existence . . .”), 5 cmt. a(2) (“In any event, and often crucial in determining the character of a relationship, there can be no trust without identifiable trust property.”).

<sup>380</sup> RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

<sup>381</sup> People can choose some of the legal settings in which they will operate (for example, when expanding to a new international market), or at least affect the *probability* of finding themselves in a given setting (for

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The legal duties that attach to this institution—the non-human legal person—must be honored by it, just as they must be fulfilled by every human living in society.<sup>382</sup> Yet, those duties (and rights) are of distinctly *secondary* nature. The *primary* degree of freedom—the one which is present *ex ante*, and only *eventually* enters (or does not enter) into the various relationships<sup>383</sup>—is the legal person or entity.<sup>384</sup>

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example, being sued in tort). Clearly, there are also many situations where law is mandatory, and involves no or little choice for the entity. *See, e.g.*, Pargendler, *supra* note 191 *passim* (discussing the phenomenon of “regulatory partitioning,” which involves the corporation’s interactions with various regulatory regimes).

<sup>382</sup> *See* Raz, *supra* note 13.

<sup>383</sup> Which then, on this distinct and lower level, can also have their own *ex ante* (as with contract) or *ex post* (as with trust and other fiduciary law) nature. *See, e.g.*, ASB Allegiance Real Est. Fund v. Scion Breckenridge Managing Member, LLC, 50 A.3d 434, 440 (Del. Ch. 2012) (discussing this variation as it exists between contract and fiduciary law).

<sup>384</sup> *Cf. supra* text accompanying notes 151–55. Earlier scholarship discusses a wide range of specific aspects of this phenomenon. *See, e.g.*, Elisabeth de Fontenay, *Individual Autonomy in Corporate Law*, 8 HARV. BUS. L. REV. 183, 223–24 & *passim* (2018) (describing the manner in which, despite the prevalence of the “private ordering” metaphor in business-related legal discourse, corporate law in fact operates to *limit* individuals’ freedom of choice in respect to the corporation; stating that “[t]here is indeed such a thing as the corporate form, and it has content beyond what any or even all interested parties may provide. . . . If . . . corporations are a net social benefit, then we have reason to preserve the elements of the form and defend its boundaries, rather than bend it to accommodate individual preferences *ex post*”); Edward B. Rock, *The Corporate Form as a Solution to a Discursive Dilemma*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 57, 62 & *passim* (2006) (discussing the “discursive dilemma,” under which different outcomes can be attained by the same person in the same situation, depending on whether the person relies on the premises used to reach the decision, or instead on the conclusion to be achieved; stating that “when coherence matters, the firm cannot choose the collective incoherence generated by stubbornly sticking to a conclusion-based decision procedure”). The conclusion-based procedure can be viewed as analogous to an *ex ante* framework (such as contract law), where some norm or information exists initially to dictate the facts (conclusions). In contrast, the premise-based procedure is analogous to the framework presented here—the legal person as an initial degree of freedom, which then generates various, unforeseeable facts.

Why and when should this situation arise? An earlier article provides a detailed illustration:

Consider, for example, a corporation like Google. Would it be possible for anyone to write an *ex ante* contract that dictates—even in broad strokes—the details of all the corporation’s future activities? Such a task is impossible, at any point in time (both at the corporation’s founding, and any “midstream” moment of its existence). The reason is that people can (and sometimes *should*) predict or plan the future only to a limited extent. Naturally, and at however high an investment of money and effort, no one could (or can today) even *imagine* most of the activities Google would engage in within a long-enough period of time. What began as purely a search engine developer turned into a corporation dealing with such projects as YouTube and autonomous cars. If Google’s existence was based on “contract,” as opposed to corporate law, none of these feats could be achieved, or they would require an *infinite* cost at the contract drafting stage. Indeed, they would require omniscience. Corporate entities both change the world, and adapt to it, in numerous, entirely unforeseeable ways. Through this, corporate law encourages innovation and entrepreneurship, in a manner that is impossible to attain by any other legal device.<sup>385</sup>

The same equally applies to other legal persons, from the corner pastry shop to SpaceX.<sup>386</sup> Due to this, the idea of personhood goes even beyond the newer economic understanding of Hansmann, Kraakman, and their successors:<sup>387</sup> the corporation is not merely about delineating asset pools;<sup>388</sup> it is, first and foremost, about *activities*.

Carrying the idea of a degree of freedom yet further, the legal person’s activities can take nearly every form that they

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<sup>385</sup> Raz, *supra* note 39, at 271–72 (footnotes omitted).

<sup>386</sup> See Raz, *supra* note 70, at 997.

<sup>387</sup> See *supra* text accompanying notes 235–50.

<sup>388</sup> See Hansmann & Kraakman, *supra* note 31 (developing the idea of asset partitioning as the core aspect of the corporation’s legal personality, and occasionally treating the two as equivalent).

could for a human:<sup>389</sup> a legal person is not limited to engaging in legal, Hohfeldian relationships per se. Nothing precludes corporations, for example, from adopting a religious, political, or cultural stance, as exemplified by *Citizens United* and *Hobby Lobby*,<sup>390</sup> the “Time culture” from *Paramount v. Time*,<sup>391</sup> and recent scholarly work.<sup>392</sup> Although many scholars and other participants still tend to think of (for-profit) corporations primarily as an economic matter, both for-profit and other corporations can affect the world in ways that have nothing to do with finance.<sup>393</sup> Personhood lies on both sides of every major dividing line we can conceive: legal and non-legal, economic and non-economic, contract and regulation, and so on.

Next, consider the manner in which legal personhood operates as a degree of freedom within corporate law itself—

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<sup>389</sup> There are few exceptions to the rule of legal persons’ broad capacity, such as the corporation’s inability to get married, vote in the general election, or engage in certain other activities. *See, e.g., In re Dole Food Co., Inc. S’holder Litig.*, 110 A.3d 1257, 1263–64 (Del. Ch. 2015) (precluding a corporation from serving as an expert witness); Miller, *supra* note 74, at 225 (“[Artificial persons’] capacities [may be] expressly delimited at law, or . . . there [may be] no rational basis in fact for the ascription of particular capacities to an artificial person.”); Raz, *supra* note 38, at 540 & n.87. These exceptions do not detract from the reality of legal personhood; they simply mean that, while both human and non-human persons have the degree of freedom described in this Article, there are some differences between the two groups. Humans, as well, do not possess some of the capacities that non-human persons do have, such as perpetual existence. *See, e.g., Schwartz, supra* note 35.

<sup>390</sup> *See supra* text accompanying notes 251–90.

<sup>391</sup> *See supra* text accompanying notes 327–40.

<sup>392</sup> *See, e.g., Sergio Alberto Gramitto Ricci, Archeology, Language, and Nature of Business Corporations*, 89 MISS. L.J. 43 (2019); David Skeel, *The Corporation as Trinity*, 45 SEATTLE U. L. REV. 155 (2021).

<sup>393</sup> *See, e.g., William J. Moon, Anonymous Companies*, 71 DUKE L.J. 1425 (2022) (explaining how corporations serve to protect the privacy of their shareholders and others, particularly when those people are members of marginalized groups, or would suffer other legal risks without the help of a corporation); Elizabeth Pollman, *Corporate Governance Beyond Economics*, in *THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP?* 183 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019).

the same framework which makes corporations into legal persons in the first place.<sup>394</sup> The most visible context is the mergers and acquisitions environment, where (to give two of the most historically prominent examples) *Paramount v. Time*<sup>395</sup> and *Twitter*<sup>396</sup> have become mirror images of one another in terms of the monetary outcome for premium-seeking shareholders, but represent exactly the same underlying principle: the corporation can *choose* whether or not to benefit its shareholders over any given time frame, and “absent a limited set of circumstances,”<sup>397</sup> the law has nothing to say about this choice.<sup>398</sup> One might disagree with what happened in *Twitter*, but under the current facts, no one can file a (meritorious) corporate law case because of it—just as Time’s shareholders could not do so in 1989.

In other intra-corporate settings, as well, personhood operates largely as a (lawful and beneficial) wild card: in *Americas Mining*,<sup>399</sup> plaintiff’s counsel gained approximately \$250 million in additional fees, based on the corporation’s nature as an entity, for successfully handling a derivative lawsuit against a disloyal controlling shareholder;<sup>400</sup> and in a line of cases including *Credit Lyonnais*,<sup>401</sup> the Delaware courts repeatedly stressed that the corporation—not its shareholders *or* stakeholders—remains the beneficiary of its fiduciaries’ duties, even in situations of insolvency.<sup>402</sup>

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<sup>394</sup> See Miller, *supra* note 74, at 223 (“[T]he law constitutes corporate persons and enables genuinely corporate purposive action . . .”).

<sup>395</sup> *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

<sup>396</sup> *Twitter, Inc. v. Musk*, C.A. No. 2022-0613-KSJM, 2022 WL 16963539 (Del. Ch. Nov. 15, 2022).

<sup>397</sup> *Paramount v. Time*, 571 A.2d at 1150.

<sup>398</sup> See *supra* text accompanying notes 327–40, 351–69.

<sup>399</sup> *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

<sup>400</sup> See *supra* text accompanying notes 344–50.

<sup>401</sup> *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc’ns Corp.*, C.A. No. 12150, 1991 Del. Ch. LEXIS 215 (Del. Ch. Dec. 30, 1991).

<sup>402</sup> See *supra* text accompanying notes 341–42; *N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101–03 (Del. 2007) (“It is well settled that directors owe fiduciary duties to the corporation. . . . Recognizing that directors of an insolvent corporation owe direct fiduciary duties to creditors, would create uncertainty for directors who have a

This understanding of personhood as an immutable fact does not always operate in the headlines: Delaware judges often rely on it, almost casually, when shaping the outcomes of their more routine decisions.<sup>403</sup> Very recently, the Delaware Court of Chancery stated that “jural entities like corporations . . . have characteristics . . . such as separate legal existence . . . . Jural entities are . . . never wholly creatures of contract. Nor are they a nexus of contracts. . . . [E]ntities are reified constructs. It is only because they are reified (personified) that they can move through the legal landscape.”<sup>404</sup>

In all of this, the theory remains solidly on the ground of well-accepted legal, economic, and social reality. Some of personhood’s critics have focused on its supposed mystical nature (which makes it easier to view personhood discourse as

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fiduciary duty to exercise their business judgment in the best interest of the insolvent corporation.”); *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 776, 792 (Del. Ch. 2004) (“Claims [for mismanaging the firm] . . . involve an injury to the corporation as an entity and any harm to the stockholders and creditors is purely derivative of the direct financial harm to the corporation itself.”; “[T]he fact of insolvency does not change the primary object of the director’s duties, which is the firm itself.”).

<sup>403</sup> See, e.g., *In re Reinz Wis. Gasket, LLC*, C.A. No. 2022-0859-MTZ, 2023 Del. Ch. LEXIS 106, at \*5–8 (Del. Ch. May 8, 2023) (“When a certificate of cancellation is filed for an entity, its ‘existence as [a] jural entit[y] cease[s].’ Its ‘legal existence ends.’ A defunct entity ceases to be a ‘body corporate.’ . . . [The defunct entity in this case] was no[ longer] a jural entity, and so its member cannot have bound it to an agreement for legal services.” (first three alterations in original; footnotes omitted) (quoting *In re VBR Agency, LLC*, 274 A.3d 1068, 1071 (Del. Ch. 2022); *In re Krafft-Murphy Co., Inc.*, C.A. No. 6049-VCP, 2011 Del. Ch. LEXIS 169, at \*18, \*27 (Del. Ch. Nov. 9, 2011)); *Lacey v. Mota-Velasco*, C.A. No. 2019-0312-SG, 2021 Del. Ch. LEXIS 25, at \*17–18 (Del. Ch. Feb. 11, 2021) (dismissing a contract law claim against directors of a corporation, because, among other reasons, “[i]t is fundamental that directors are not subject to a contract simply because it binds the corporation”).

<sup>404</sup> *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 568 n.159 (Del. Ch. 2023). Another recent Chancery opinion, similarly engaging with the corporation’s entity nature, and cited in the same footnote from *New Enterprise Associates*, is *In re Coinmint, LLC*, 261 A.3d 867 (Del. Ch. 2021) (mentioning the words “entity” and “entities” 81 times in a 39-page opinion, and relying on that concept to reach the outcome in the case).

either a laughable accident or a façade for directors' disloyal actions),<sup>405</sup> but there is nothing supernatural about a theory of personhood that builds upon, and contributes to, well-recognized concepts such as Hohfeldian rights and duties, private law and its subdivisions, Knight's distinction between risk and uncertainty, or Professor Henry Smith's theory of equity as meta-law.<sup>406</sup> In fact, even when scholars discuss veil piercing and veil peeking<sup>407</sup>—situations where humans directly bear rights or duties that would normally be attributed to the corporation (or vice versa)—they recognize that those situations are not an exception to corporate personhood, but exist alongside it.<sup>408</sup> While equity permits (and even requires) some flexibility in allocating rights and duties between the corporation, its shareholders, and others, in all cases the entity is present.<sup>409</sup>

Finally, the *temporal* distinction that attaches to the idea of personhood as a legal degree of freedom should be

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<sup>405</sup> See, e.g., Friedlander, *supra* note 40, at 40, 76–83 & *passim* (stating that “[i]n the late nineteenth century, the eminent German legal historian Otto Gierke theorized that when individuals unite, spiritually and psychologically, for a common purpose they create a separate, living person that has a will of its own” (footnote omitted); discussing Gierke’s “Theory of the Corporation as Group-Person”; criticizing the Delaware courts’ *Paramount v. Time* decisions, as well as criticizing Time’s fiduciaries for pursuing the outcome reached in these decisions).

<sup>406</sup> See *supra* notes 48, 152–55, 187–91, 373–80 and accompanying text.

<sup>407</sup> See, e.g., Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. PA. L. REV. 717 (2021).

<sup>408</sup> See Mariana Pargendler, *The Fallacy of Complete Corporate Separateness* 1–2 (Working Paper) (Dec. 29, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3994854](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994854) [<https://perma.cc/D57P-3LL7>] (“Legal personality undoubtedly provides a separate—in the sense of *distinct*—nexus for the imputation of legal rights and duties. However, this does not entail that corporations are or should be treated as legally separate—in the sense of *insulated*—from shareholders in all contexts.”).

<sup>409</sup> There is a limited number of ways in which a corporate entity can cease to exist, primarily through merger or dissolution (liquidation). See, e.g., Raz, *supra* note 13, at 985–86. Veil piercing and veil peeking are neither of those ways; when they occur, the corporate entity does not disappear. What does change is the allocation of certain rights, duties, or other traits between the corporation and other people (most often its shareholders).

emphasized once again, in a broader scholarly context. While the early generation of law and economics (among other movements) attempted to rely on a fully *ex ante* worldview<sup>410</sup>—which minimizes and even mocks unpredictability, the oddness of real-life situations, and the need for equity and nuance<sup>411</sup>—reality does not align with this attempt.

In fact, both humans and legal persons (such as corporations) can *make* contracts, but are not themselves a contract, nor a nexus thereof. Instead, they operate in the world in an open-ended manner, generating economic, social, and technological benefits precisely because no one can tell in advance which contracts (or property, or political, religious, and cultural views, or other aspects of reality) they will enter. This recognition—that what happens after the fact is at least as important as what we try to delineate beforehand; that we should embrace the inevitable strangeness of new situations, instead of denying the legal system the leeway to deal with them—can help shape the law, academic research about it, and public reactions to it, in a more constructive manner.

## V. HOW PERSONHOOD INTERACTS WITH ONGOING SCHOLARLY AND POLICY DEBATES

### A. Recognizing the Overall Complexity of Corporate Law, While Moving On from “Agency Costs” and Direct Fiduciary Duties

The culture of personhood minimization, some of whose main proponents are discussed (and responded to) throughout this Article, connects with a broader problem of reductionism in corporate law scholarship. Over the last half-century, as many commentators have neglected the corporation’s entity nature, they have also drawn a picture of corporate law where,

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<sup>410</sup> See, e.g., Saul Levmore, *The Ex-Middle Problem for Law-and-Economics*, 22 AM. L. & ECON. REV. 1, 2–6 (2020) (“Law-and-economics is driven by an *ex ante* perspective. . . . [T]he very idea of an ex-middle ‘problem’ for law-and-economics is jarring to scholars of contract law.”).

<sup>411</sup> See, e.g., *supra* text accompanying notes 202–25.



essentially, everything is about “agency costs”<sup>412</sup>—or, in a formulation slightly more charitable to legal concepts, all of corporate law is about fiduciary duties.

For example, high-profile debates, such as those over multiple-class share structures,<sup>413</sup> staggered boards,<sup>414</sup> “short-termism” vs. “long-termism,”<sup>415</sup> and executive compensation,<sup>416</sup> have been conducted under the general assumption that directors and officers owe direct duties to shareholders, and that the law’s mission is to minimize the agency costs that result from attempts to violate those duties. Even after the discussion finally went beyond this two-party view, expanding to include the corporation’s employees,

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<sup>412</sup> See, e.g., J.B. Heaton, *Corporate Governance and the Cult of Agency*, 64 VILL. L. REV. 201, 207 (2019) (“A huge amount of scholarship in corporate law and financial economics assumes the existence of agency costs[:] losses that result from expenditures to prevent managerial disloyalty plus the loss of shareholder value from disloyalty that occurs despite these expenditures.”).

<sup>413</sup> Compare, e.g., Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 590–91 (2017) (advocating the adoption of “sunsets,” which mandate the cancellation of the more senior class of shares a certain period of time after its issuance), with, e.g., Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. REV. 1057, 1063–64 (2019) (criticizing this possibility).

<sup>414</sup> See, e.g., Yakov Amihud, Markus Schmid & Steven Davidoff Solomon, *Settling the Staggered Board Debate*, 166 U. PA. L. REV. 1475 (2018).

<sup>415</sup> Compare, e.g., Martin Lipton, *Revisiting The New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 19, 2023), <https://corpgov.law.harvard.edu/2023/07/19/revisiting-the-new-paradigm> [<https://perma.cc/788N-VHNN>] (describing Lipton’s new paradigm for corporate law as “resist[ing] the call of short-term financial activists seeking to force short-term value enhancements without regard to long[-]term value implications”), with, e.g., Michal Barzuza & Eric Talley, *Long-Term Bias*, 2020 COLUM. BUS. L. REV. 104, 189–90 (“[A]long with short-term pressures, managers also suffer from long-term biases. . . . [L]ong-term projects are systematically susceptible to overestimation by managers. . . . [O]ur framework leaves us skeptical about the desirability of unalloyed long-termist frames for maximizing shareholder value . . .”).

<sup>416</sup> See, e.g., LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004).

consumers, and other stakeholders,<sup>417</sup> much of the literature continues to revolve around the extent to which managers presumably owe direct fiduciary duties to those other groups.<sup>418</sup> Similarly, more specific conversations, such as that regarding preferred shareholders, have often been conducted through the “direct fiduciary” lens.<sup>419</sup>

This Article completes a series of works demonstrating that corporate law has a substantially more complex structure. In fact, corporate law is not about one concept—fiduciary duty—but rather, can be sub-divided into at least five different areas: the law of corporate purpose;<sup>420</sup> the law of corporate personhood (explored in detail here); the legal primacy norm, which governs the corporate law dimension of the corporation’s relationships with its stakeholders;<sup>421</sup> share law, which governs the corporation’s relationships with its

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<sup>417</sup> See, e.g., Raz, *supra* note 13, at 935 (“Since 2019, the shareholder-stakeholder debate has become the central topic in corporate law scholarship.”).

<sup>418</sup> See, e.g., Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565 (2021) (“[O]nly two decades after prominent scholars announced ‘the end of history’ in favor of shareholder primacy, luminaries in the field are again asking these central questions of corporate law: For whom is the corporation managed? Do fiduciaries owe a duty to maximize shareholder value or may they prioritize the interests of other stakeholders?” (footnotes omitted)); Jared A. Ellias & Robert J. Stark, *Delaware Corporate Law and the “End of History” in Creditor Protection*, in FIDUCIARY OBLIGATIONS IN BUSINESS 207, 207–15 (Arthur B. Laby & Jacob Hale Russell eds., 2021) (“[D]irectors and officers will be held liable to shareholders . . . . [W]hen insolvency sets in[,] . . . creditors replace shareholders as the primary economic stakeholders. . . . [S]ome scholars had always felt that fiduciary duty law ought to protect creditors . . .”).

<sup>419</sup> See, e.g., Sarath Sanga & Eric Talley, *Don’t Go Chasing Waterfalls: Fiduciary Duties in Venture Capital Backed Startups* (Eur. Corp. Governance Inst. Working Paper No. 634, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3721814](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721814) [<https://perma.cc/67Y6-33M8>].

<sup>420</sup> See Raz, *supra* note 38 (introducing the purpose-based theory of corporate law, as well as introducing corporate law’s division into the five categories discussed here).

<sup>421</sup> See Raz, *supra* note 13 (introducing the legal primacy norm).

residual claimants;<sup>422</sup> and, finally, corporate fiduciary law, which governs the corporation's relationships with its directors, officers, and other fiduciaries.<sup>423</sup> This structural approach brings cutting-edge developments in legal theory—such as Professor Henry Smith's systems theory of law,<sup>424</sup> and more generally the new private law (NPL) movement<sup>425</sup>—into the corporate law sphere,<sup>426</sup> where legal theory has not been center stage for many decades.

Lest one be suspected of lack of “realism,”<sup>427</sup> this more nuanced structure captures precisely what corporate law, and the actors who both shape it and are subject to it, do in day-to-day reality. Examples are countless. Consider a particularly clear one: the structural approach can—and the “direct fiduciary” view cannot—explain the fact that the law of appraisal, an important part of corporate law in Delaware and elsewhere, does not require any breach of fiduciary duty to find that a merger price was insufficient.<sup>428</sup> Appraisal law

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<sup>422</sup> See Raz, *supra* note 314 (introducing the concept of share law).

<sup>423</sup> See Raz, *supra* note 39 (introducing the open-endedness principle of corporate law, as well as explaining why that principle makes corporate law distinct from contract law, and makes it impermissible to waive fiduciary duties owed to the corporate entity).

<sup>424</sup> See Smith, *supra* note 62, at 144 (“Systems theory offers notions of system and complexity that suggest more fruitful alternatives. A system is a collection of elements and—crucially—the connections between and among them; complex systems are ones in which the properties of the system as a whole are difficult to infer from the properties of the parts.”).

<sup>425</sup> See *supra* notes 61–76 and accompanying text.

<sup>426</sup> See Raz, *supra* note 70 (discussing in detail why corporate law is part of private law, and the application of NPL literature to various ongoing debates in corporate law).

<sup>427</sup> Cf. *supra* Section II.B.

<sup>428</sup> See, e.g., Lawrence A. Hamermesh & Michael L. Wachter, *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, 42 J. CORP. L. 597, 648 (2017) (“[T]he petitioners in [statutory appraisal] litigation . . . need not plead any breach of fiduciary duty . . . .”); Brief of Law, Economics and Corporate Finance Professors as *Amici Curiae* in Support of Petitioners-Appellees and Affirmance at 6, *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017) (No. 518, 2016) (“Directors can satisfy their fiduciary

is one of the many facets of share law (or the law of residual claims),<sup>429</sup> which mostly positions shareholders as equitable, but non-fiduciary, claimants.<sup>430</sup>

Going back to several of the highest-profile episodes in corporate law history,<sup>431</sup> the structural approach can easily accommodate the long line of Delaware takeover cases, from *Unocal*,<sup>432</sup> *Revlon*,<sup>433</sup> and *Paramount v. Time*<sup>434</sup> to *Twitter*,<sup>435</sup> where directors simply cannot be said to have owed a fiduciary duty to shareholders. The defining characteristic of a fiduciary is the duty to operate in the beneficiary's interest; if the shareholders were the beneficiaries, then directors' refusal to maximize their wealth (in *Unocal* and *Paramount v. Time*), the fact that they *could* refuse to do so without violating any duty (in *Twitter*), and the court's emphasizing that having a duty to do so is an exception (in *Revlon*), would not be consistent with law. In fact, all of these scenarios were entirely lawful, because under corporate fiduciary law, the fiduciary duty is owed to the corporate entity, to advance *its* lawful profit-seeking purpose, and (as a rule) not to shareholders.

Stakeholders, as well, are not beneficiaries under corporate fiduciary law: as the Delaware courts stressed in

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duties even when a sales process is insufficient to achieve the stock's fair value under [Delaware General Corporation Law] Section 262.”)

<sup>429</sup> See Raz, *supra* note 314, at 311–19.

<sup>430</sup> See, e.g., Paul B. Miller, *Equity, Majoritarian Governance, and the Oppression Remedy*, in FIDUCIARY OBLIGATIONS IN BUSINESS, *supra* note 418, at 171 (discussing equity as distinct from fiduciary law, and an equity-based view of shareholders' rights as distinct from one based on fiduciary duty owed to shareholders). About non-fiduciary equity, see also Henry E. Smith, *Why Fiduciary Law Is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 29, at 261, 261 (“Fiduciary law is an *outgrowth* of equity—perhaps the most important and characteristic *branch* of the tree of equity . . . .” (emphases added)).

<sup>431</sup> For detailed discussion of these cases, see *supra* Part III.

<sup>432</sup> *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

<sup>433</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985).

<sup>434</sup> *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

<sup>435</sup> *Twitter, Inc. v. Musk*, C.A. No. 2022-0613-KSJM, 2022 WL 16963539 (Del. Ch. Nov. 15, 2022).

numerous cases, including the landmark *Gheewalla*<sup>436</sup> decision, directors' duty is to the corporation; when they cause the corporation to breach its obligations (for example, by making it insolvent),<sup>437</sup> a fiduciary cause of action accrues to the corporation against its directors, which stakeholders can only enforce through a derivative action.<sup>438</sup> What stakeholders do have is, first, their various claims under non-corporate law (from employment to environmental law), which—contrary to statements about “shareholder primacy”—are in fact more *senior* and easily enforceable, compared to those arising under corporate law itself (with its business judgment rule and other ex post-oriented devices). Second, stakeholders also benefit from the legal primacy norm,<sup>439</sup> which requires directors to cause *the entity* to act lawfully (an inherent part of promoting the entity's purpose),<sup>440</sup> ensuring that shareholders cannot validly receive

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<sup>436</sup> N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101–03 (Del. 2007) (“It is well settled that directors owe fiduciary duties to the corporation [either when it is solvent or insolvent]. . . . [D]irectors . . . have a fiduciary duty to exercise their business judgment in the best interest of the insolvent corporation.”).

<sup>437</sup> See, e.g., *infra* Section V.B.

<sup>438</sup> See *Gheewalla*, 930 A.2d at 101–03 (“[T]he creditors of an insolvent corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties. . . . [I]ndividual creditors of an insolvent corporation have no right to assert direct claims for breach of fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation . . . .” (emphases omitted)).

<sup>439</sup> See Raz, *supra* note 13.

<sup>440</sup> See *id.* at 961–85 (exploring several well-recognized doctrines of corporate law, including fiduciary good faith, directors' oversight duties, the mandatory limits on dividends and buybacks, the shift in corporate purpose in the vicinity of insolvency, and the seniority of preferred shareholders and trust shareholders, all of which impose duties on directors and other fiduciaries to prevent the corporation from violating, or increasing the probability of violating, its legal obligations to extra-corporate stakeholders).

value from the entity as long as it does not meet all obligations to its stakeholders.<sup>441</sup>

If there is still place for discourse about “agency problems” and “agency costs,” then first, it must be made clear that as a rule, those costs subsist between fiduciaries and *the corporation*, not shareholders or anyone else. In practice, there are many conflicts or disparities between shareholders and the corporation, between shareholders themselves, between stakeholders and the corporation, and so on; the more coherent approach is that “[t]he value of the corporation itself . . . best reflects the sum of the participants’ interests and it is to the corporation that the fiduciary duty should be owed.”<sup>442</sup>

Second, the use of the term “agency” must be understood in the context of its reductionist origins: in the neo-realist era of the 1970s to the 1990s, economists (and lawyer-economists) could believe that it was legitimate to utilize a single, highly general, bordering on hand-waving metaphor to try and encompass the broad range of phenomena that corporations are involved in.<sup>443</sup> As many later works—and the discussion

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<sup>441</sup> See *id.* at 937 (“No shareholder majority can ever declare (in a shareholder meeting, or in the corporation’s formative documents) that the entity may breach any of its non-corporate legal duties.”), 972–73 (discussing the mandatory duty imposed on shareholders, to repay to the corporation a dividend or buyback proceeds, if the shareholder knew that the distribution violates the stakeholder-protective limits on dividends and buybacks).

<sup>442</sup> Pollman, *supra* note 36, at 218.

<sup>443</sup> See *supra* text accompanying notes 178–226. While agency law is a well-recognized legal framework, it is clearly separate from corporate law. See, e.g., *Miller & Rhoads v. West*, 442 F. Supp. 341, 344 (E.D. Va. 1977) (“[T]he corporate directors are not agents of the corporation since they are the controllers rather than the controlled, but neither are they the master of the corporation’s employees. Their position makes them *sui generis* in the hierarchy of legal conceptions.”); Raz, *supra* note 39, at 263 n.264 (explaining why “corporate law is not and cannot be a branch of agency law”); Tomer S. Stein, *Of Directorships: Reconfiguring the Theory of the Firm* 23 (Working Paper) (Aug. 28, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4553445](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4553445) [<https://perma.cc/25ZC-6X2Y>] (“[H]iring directors, as opposed to agents and trustees, profoundly affects the nature of the firm. Directorships fundamentally differ from both agency and trust relationships. Directors,

in this Section—have shown, corporate law has far more complex structure, involving not one idea (“agency” or “fiduciary”), but at least five interacting sub-categories (the laws of corporate purpose, personhood, legal obedience, residual claimancy, and fiduciary duty). Corporations, in turn, are not creatures of economics, but creatures of law.<sup>444</sup> At all times, the agency metaphor should be translated into the appropriate legal, Hohfeldian analysis, closely examining both the identity of the *parties* and the *normative content* of the rights and duties that bind them: for example, are we dealing with fiduciaries who have expropriated the corporation’s assets, or rather with shareholders seeking to correct an inadequate merger consideration, or instead with stakeholders pursuing remedy for violation of their extra-corporate legal rights against the corporation?

Third, and as this last example indicates, the agency discourse—even when translated to legal terms, as the discussion here urges—should not be harnessed to depict corporate law as a scene where a certain, pre-defined group (shareholders, stakeholders, or perhaps even directors<sup>445</sup>) always wins. Put differently, we must set aside the mistaken dichotomy between “shareholder primacy” and “corporate social responsibility.”<sup>446</sup> The corporate entity, like any other

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agents, and trustees are all fiduciaries, but not all fiduciaries are created equal. . . . Directorships[] . . . characteristics, not present in agents and trustees, are the directors’ status and functioning as the firm’s residual obligors and the strong-form separation of ownership and control.”).

<sup>444</sup> See, e.g., Deakin et al., *supra* note 32, at 194–95.

<sup>445</sup> See Bainbridge, *supra* note 343 (describing “director primacy” as “the means and ends” of corporate governance).

<sup>446</sup> For earlier works arguing that corporate law follows, and should continue to follow, a path different than both of these conceptions, see Raz, *supra* note 13 *passim*; Raz, *supra* note 38, at 526–30. A growing body of literature is offering similar ideas. See, e.g., ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT (2020); Lior Frank, *Monopolistic Excessive Pricing as an “ESG Violation”*, 22 J. INT’L BUS. & L. 204 (2023); Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167 (2021); Jeffrey M. Lipshaw, *The False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. 345 (2021); Christina Parajon Skinner, *Cancelling Capitalism?*, 97 NOTRE DAME L. REV.

person, operates as a legal degree of freedom,<sup>447</sup> which can constantly create, perform, modify, participate in, allocate, or re-allocate rights, duties, activities, resources, and so on. Along with this general open-endedness, the corporation is bound by *some* ex ante constraints, manifesting throughout corporate law: the law of corporate purpose, together with the legal primacy norm and share law, requires a for-profit corporation (for example) to engage in the lawful pursuit of profit, and its fiduciaries are duty-bound to cause it to do so.<sup>448</sup> In this picture, both the entity, its stakeholders, and its shareholders have legal rights, but those rights neither give shareholders “primacy,” nor expand stakeholders’ claims to include what they do not actually include under positive law. Despite the proliferation of three-letter acronyms in this area (“CSR,” “PRI,” and so on), “[t]he correct three letters are ‘law.’”<sup>449</sup>

## B. The *Nine West* Case

Part III above has discussed the foundational role played by legal personhood at the world’s most important corporate law system, that of Delaware. Yet, personhood is also central to corporate law in other jurisdictions; and, despite the difficulty which federal courts often encounter when dealing with private and common law matters,<sup>450</sup> sometimes they *do* correctly accommodate the corporation’s entity nature in their decisions. This Section discusses one recent, closely-

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417 (2021) (reviewing EDMANS, *supra*); Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359 (2016).

<sup>447</sup> See *supra* Part IV.

<sup>448</sup> See *supra* note 367.

<sup>449</sup> Raz, *supra* note 38, at 557.

<sup>450</sup> See *supra* text accompanying notes 266–85.



watched<sup>451</sup> example: *Nine West*,<sup>452</sup> a 2020 decision by Judge Jed Rakoff of the United States District Court for the Southern District of New York.

According to the court's summary of the facts, in 2013, "the private equity firm Sycamore Partners Management, L.P. . . . offered to buy [Pennsylvania corporation] Jones Group for \$15 per share, reflecting an implied enterprise value of \$2.15 billion."<sup>453</sup> As part of the transaction (which closed in 2014),<sup>454</sup> The Jones Group Inc. was "renamed Nine West Holdings, Inc.,"<sup>455</sup> and this entity undertook to "increase its debt from \$1 billion to[, after additional changes to the deal terms,] . . . \$1.55 billion,"<sup>456</sup> and to sell ("carve out") a large part of its assets, to affiliates of the private equity firm, for "a price substantially below [the assets'] fair market value."<sup>457</sup> This transaction structure was approved by the Jones Group's directors, despite warnings from the company's investment banker that the new debt-to-earnings ratio would be unsustainable,<sup>458</sup> thus placing the post-transaction entity in substantial risk of insolvency.

Eventually, that is precisely what happened: "roughly four years after the merger closed, Nine West filed for bankruptcy."<sup>459</sup> The bankruptcy court appointed a litigation trustee to pursue state and federal law claims against the Jones Group's directors in connection with the 2014

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<sup>451</sup> See, e.g., Ann Lipton, *Shareholders, Stakeholders, and Nine West*, BUS. L. PROF. BLOG (Mar. 6, 2021), [https://lawprofessors.typepad.com/business\\_law/2021/03/shareholders-stakeholders-and-nine-west.html](https://lawprofessors.typepad.com/business_law/2021/03/shareholders-stakeholders-and-nine-west.html) [<https://perma.cc/CTB2-7K5B>]; Sujeet Indap, *Dealmakers Warn of Chilling Effect on Buyouts from US Court Ruling*, FIN. TIMES (Dec. 15, 2020), <https://www.ft.com/content/01affe9d-89a7-4c0e-8a15-d6d544d4ce04> [<https://perma.cc/5XKR-F3YU>].

<sup>452</sup> *In re Nine W. LBO Sec. Litig.*, 505 F. Supp. 3d 292 (S.D.N.Y. 2020).

<sup>453</sup> *Id.* at 301.

<sup>454</sup> See *id.* at 302.

<sup>455</sup> *Id.* at 301.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* at 302.

<sup>458</sup> See *id.* at 301.

<sup>459</sup> *Id.* at 303 (capitalization altered).

transaction.<sup>460</sup> Most pertinently, the litigation trustee asserted breaches of fiduciary duty under Pennsylvania corporate law.<sup>461</sup> As the federal district court said, “[t]he complaints [adequately] allege that director defendants did not investigate whether the additional debt and carve-out transactions would render the company insolvent.”<sup>462</sup> Because such investigation is a prerequisite for enjoying the protection of the business judgment rule,<sup>463</sup> the court denied this part of the former directors’ motion to dismiss, allowing the litigation against them to proceed on this ground.<sup>464</sup>

Some commentary has questioned the decision’s plausibility from a corporate theory perspective. As Professor Ann Lipton wrote,

[when shareholders might] court bankruptcy, because they’re being bought out at \$15 per share and they don’t really care what happens after that, the directors have [arguably] satisfied their duties and nothing more needs be said. The whole point of *Revlon*, after all, is that there is such a thing as a[n] endgame transaction, after which shareholders exit the company and fiduciary duties cease. . . . [T]he director-defendants argued that no duty to creditors would attach until the *actual* point of insolvency . . . . [Judge] Rakoff chose not to engage in any of this. Instead, he simply declared that the directors’ duties were to the *company* . . . . Rakoff went on to conclude that the Nine West directors had neglected their duties *to the company* by failing to investigate the effects of the deal on *the company*, and, in particular,

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<sup>460</sup> See *id.* The litigation trustee was appointed alongside an “[i]ndenture [t]rustee,” tasked with pursuing claims raised by “certain noteholders of Nine West,” *id.* Because the two trustees’ complaints against the directors were “consolidated,” *id.* at 304, the reference in the text here is simply to the litigation trustee.

<sup>461</sup> See *id.* at 310.

<sup>462</sup> *Id.* at 311 (capitalization altered).

<sup>463</sup> See *id.* at 312 (“Pennsylvania law does not require a finding of self-interestedness to overcome the business judgment rule; a director’s failure to make a reasonable investigation is enough.”).

<sup>464</sup> See *id.* at 322.

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failing to investigate the possibility that the transactions would harm *the company* by leaving it insolvent. . . . By focusing on *the company*, Rakoff obscured the implications of his holding regarding the true parties in interest.<sup>465</sup>

The solution to this presumed conundrum—in *Nine West* as in the many Delaware and other cases surveyed throughout this Article—is that directors’ duties were never owed to either shareholders *or* creditors. Under foundational conceptions of both Delaware<sup>466</sup> and Pennsylvania law,<sup>467</sup> the corporate entity *is* the true party in interest. Although fiduciary duties can cease toward a certain group of shareholders (assuming *Revlon* or a similar exception ever occurred in the first place),<sup>468</sup> they can never cease toward the corporation, as long as that legal person exists. Directors’ core duty is to advance the corporation’s purpose,<sup>469</sup> which includes obeying the law (or, put differently, fulfilling all obligations to stakeholders).<sup>470</sup> The Jones Group’s and Nine West’s directors failed to do so when they closed their eyes in the face of approaching insolvency; in Delaware and elsewhere, it is not business judgment to cause the corporation to dishonor its creditors’ legal rights.<sup>471</sup> Creditors, and other stakeholders, have claims against the corporation, grounded in numerous areas of law, but those are not the

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<sup>465</sup> Lipton, *supra* note 451.

<sup>466</sup> *See supra* Part III.

<sup>467</sup> *See, e.g.*, 15 PA. CONS. STAT. §§ 1501 (“[A] business corporation shall have the legal capacity of natural persons to act.”), 1712(a) (“A director of a business corporation shall stand in a fiduciary relation to the corporation and shall perform the duties of a director . . . in good faith, [and] in a manner the director reasonably believes to be in the best interests of the corporation . . .”).

<sup>468</sup> *See supra* note 324 and accompanying text.

<sup>469</sup> *See, e.g.*, Raz, *supra* note 13, at 961–64.

<sup>470</sup> *See id. passim*.

<sup>471</sup> *See, e.g.*, Pollman, *supra* note 313, at 2017–27 (“Delaware courts have prioritized giving directors broad latitude to take business risk by drawing a line at legal risk . . . . [F]idelity to the law is nonnegotiable and is a requirement that aims to protect a public realm to which corporate law must subscribe, rather than to protect shareholders from agency costs.”).

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fiduciary law claims that the corporation has toward *its* fiduciaries.<sup>472</sup>

In sum, Judge Rakoff did not “cho[o]se not to engage”<sup>473</sup> with the question of who benefits from directors’ fiduciary duties; rather, he gave it precisely the correct answer—the one that follows both the letter and the principles of corporate law. When recognizing the corporation itself as the party to relationships with other people, the *Nine West* opinion merely refused to subscribe to twentieth century-style extra-legal reductionism,<sup>474</sup> and that is a welcome development.

## VI. CONCLUSION

Three phrases have shaped modern corporate law scholarship: first, “agency costs” which run directly between corporate managers and shareholders; second, “shareholder primacy” (and its supposed dichotomy with “corporate social responsibility”); and third, the belief that a corporation is a “nexus of contracts” among other, presumably more real, people. Under the combined influence of legal realism and the early generation of the law and economics movement, such metaphors have become a norm—mostly, and ironically, in those areas, such as corporate law, that have the most complex conceptual structure.

This Article has brought front and center one concept that fell by the wayside of previous, reductionist discourse: legal personhood. The idea of non-human personhood has been the subject of minimization, intellectual fragmentation, and sometimes even mockery or disdain by scholars and members of the public (for example, following the *Citizens United* and *Hobby Lobby* saga). This Article, however, has shown that personhood is a common law concept (predating both the Constitution and modern law and economics), equally as traditional as contract or property—and, in fact, even more fundamental in the hierarchy of legal notions.

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<sup>472</sup> See, e.g., Raz, *supra* note 13, at 975.

<sup>473</sup> Lipton, *supra* note 451.

<sup>474</sup> See *supra* Section II.B.

Departing from earlier, more mystical conceptions, this Article has demonstrated that personhood both derives from, and contributes to, mainstream canons of legal and economic thought, including (among many others) Hohfeldian rights and duties, the distinction between risk and uncertainty, and the law of mergers, acquisitions, and fiduciary duties. There is nothing strange or untoward about personhood, and it is time to move away from hand-waving metaphors (such as “nexus of contracts,” shareholders as “owners,” and similar “aggregate” conceptions), and fully embrace personhood in scholarship and practice.

The recent *Twitter* litigation—possibly the most closely-watched corporate law case in history—has demonstrated, once again, how personhood enables its bearers to affect reality in ways that could not be achieved under any other, non-personhood-based framework: no contract, nor fiduciary duty, *obliged* Twitter to litigate its \$44 billion merger to completion. The fact that Twitter did so—in contrast to what would normally be expected from a Delaware corporation, under precedents dating back to the 1980s takeover era—demonstrates that, as a legal entity, Twitter could *choose* whether or not to benefit its shareholders, or other stakeholders (beyond their existing legal rights), over any given time horizon. Precisely because Twitter—like other corporations—enjoys this degree of freedom, it was able to achieve its wide-ranging technological and social feats in the first place.

This Article has made three main contributions to the literature, across the domains of corporate law, legal theory, judicial policy, and law and economics. First, this Article is the first work of scholarship to analyze, in a manner closely applicable to present-day debates, the historical timeline of personhood discourse. As discussed in Part II, the personhood of non-human entities has been recognized in the common law for several hundred years, and was well-accepted by the end of the nineteenth century. During the twentieth century, the reductionist trends of legal realism (as epitomized by Dewey and Cohen) and early law and economics (as epitomized by Jensen, Meckling, Easterbrook, and Fischel) have relegated

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personhood to a darker corner of academic discourse. Over the last two decades, personhood has again emerged strong, with the works of Hansmann, Kraakman, and their law and economics successors, as well as the renewed interest stemming from the Supreme Court's *Citizens United* and *Hobby Lobby* decisions.

This Article's second main contribution is to show that even these positive developments have, until now, not gone far enough. The core problem is the disconnect between the various spaces where personhood is operating: while state common law—particularly that of Delaware, surveyed in detail in Part III—continues to shape its highest-profile judicial outcomes in the mold of the corporation's entity nature, that scene has yet to establish a fully consistent interface with the newer law and economics scholarship. Nor did these two fundamentally connect with the constitutional personhood discussion. In a post-realist world, where legal concepts are increasingly being taken as serious, systematic, and beneficial constructs, these participants should recognize that they are all discussing the very same idea—and indeed, be prepared for additional scenes where personhood will spring with as-yet unforeseen implications.

Through its third main contribution, this Article helps these policymakers and scholars do so. In Parts II and III summarized above, and particularly in Part IV, this Article has presented an innovative theory of personhood as a *legal degree of freedom*. In a world without non-human personhood, people would be able to make contracts with one another, own property, and so on, but they would always be restricted by the subject matter and ex ante limitations inherent to each of these legal regimes. In contrast, personhood-based legal frameworks—namely, corporate law—enable the creation of a more preliminary actor (legal degree of freedom), which *then* chooses which legal relationships and other aspects of reality (such as taking political, religious, and cultural stances) to engage in, whether to do so, when, with whom, and how. Much of the entrepreneurial progress that shapes our daily life and society would not be feasible without this legal device. The ongoing scholarly and policy debates, discussed in Part V,

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illustrate how the effects of personhood in practice are both wide-ranging and constantly emerging anew.

While previous literature has focused on distinct aspects of legal personhood—such as asset partitioning, capital lock-in, or constitutional rights—this Article is the first to tie them, and many others, into a unifying paradigm. Personhood will continue to play this open-ended role well into the future, and the theory offered in this Article will, hopefully, enable more participants to accept it as a natural, and beneficial, component of the legal order.

